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No. _____

In The

# Supreme Court of the United States

October Term, 1991

PAUL F. MCDONALD,

*Petitioner,*

v.

PIEDMONT AVIATION INC.,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where a jury found liability for a breach of the duty to hire in Section 43(d) of The Airline Deregulation Act of 1978, and the trial Court refused to award a job, but used a "make whole" measure of monetary damages in the job's stead, whether it was error to reduce those damages to a seventy-two month period by importing from Section 43(e) a limit on the wholly separate government assistance program, intended to protect federal revenues, where this truncating of damages leaves the wronged party without either the job that the statute and verdict still entitle him to, or compensation therefor, and wholly frustrates the several purposes of Section 43(d).

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

OPINIONS FROM OTHER COURTS AND AGENCIES ..... 1

JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

STATEMENT OF FACTS ..... 3

REASONS FOR GRANTING THE WRIT ..... 5

ARGUMENT ..... 6

CONCLUSION ..... 26

APPENDIX 1 . . . Opinion of the United States Court of Appeals for the Second Circuit in *Paul F. McDonald v. Piedmont Aviation, Inc.* 930 F 2d 220 (No. 90-7328, 2d Cir., April 11, 1991) ....App. 1

APPENDIX 2 . . . Order of the United States Court of Appeals for the Second Circuit in *McDonald v. Piedmont*, Ibid, June 24, 1991 .....App. 17

APPENDIX 3 . . . Order of the United States Court of Appeals for the Second Circuit in *McDonald v. Piedmont*, Ibid, April 25, 1991 .....App. 19

APPENDIX 4 . . . Opinion of the United States District Court, S.D. New York in *McDonald v. Piedmont*, 625 F Supp 762, No. 84 Civ. 8262 CLB, Jan. 6, 1986.....App. 21

TABLE OF CONTENTS – Continued

Page

APPENDIX 5 . . . Opinion of the United States District Court, S.D. New York in *McDonald v. Piedmont*, 695 F Supp 133, Sept. 7, 1988.....App. 32

APPENDIX 6 . . . Memorandum and Order of the United States District Court, S.D. New York, in *McDonald v. Piedmont*, 84 Civ. No. 8262 (CLB), April 27, 1989.....App. 44

APPENDIX 7 . . . JURY INSTRUCTIONS, of the United States District Court, S.D. New York in *McDonald v. Piedmont*, Ibid.....App. 49

APPENDIX 8 . . . Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Crocker v. Piedmont*, No. 90-7021, May 24, 1991.....App. 53

APPENDIX 9 . . . The Airline Deregulation Act of 1978, §§ 102(a)(1) & (2), and § 43 (49 USC §§ 1302(a)(1) & (2), § 1552).....App. 66

APPENDIX 10 . . . Affidavit of Air Safety Expert John J. Nance, dated May 13, 1991, submitted to the Second Circuit Court of Appeals in *McDonald v. Piedmont*, 90 Civ. No. 7328 .....App. 74

## TABLE OF AUTHORITIES

Page

CASES

*Alaska Airlines, Inc. v. Brock*, 480 US 678 (1987) ..... 3, 5, 6, 13, 20, 22

*Alaska Airlines, Inc. v. Donovan*, 594 F Supp 92 (D.D.C. 1984) ..... 5

*Albemarle Paper Co. v. Moody*, 422 US 405 (1975) ..... 13

*American Tobacco Co. v. Patterson*, 456 US 63, 68 (1982) ..... 11

*Bigelow v. RKO Radio Pictures*, 327 US 251, 265 (1946) ..... 16

*Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 US 837 (1984) ..... 9

*Crandon v. United States*, ___ US ___, 110 S Ct 997, 108 L Ed 2d 132 (1990) ..... 11, 12

*Crocker v. Piedmont Aviation, Inc.*, 741 F Supp 241, No. 86-1673 (D.D.C. Aug. 11, 1989), *appeal docketed*, No. 90-7021 (D.C. Cir. Feb. 23, 1990) ..... 1, 6, 7, 8, 18

*Crocker v. Piedmont*, (C.A.D.C. Cir., No. 90-7021, May 24, 1991) ..... 9

*Gozlon-Peretz v. U.S.*, 112 L Ed 2d 919, 930 (1991) ..... 10

*Guidry v. Sheet Metal Workers National Pension Fund*, ___ US ___, 110 S Ct 680, 107 L Ed 2d 782 (1990) ..... 11

*Hughey v. United States*, 495 US ___, 109 L Ed 2d 408, 110 S Ct ___ (1990) ..... 12

*McDonald v. Piedmont Aviation, Inc.*, 625 F Supp 762, 765 (1986) ..... 26

TABLE OF AUTHORITIES – Continued

Page

*McDonald v. Piedmont Aviation, Inc.*, 930 F 2d 220 (No. 90-7328, 2d Cir., April 11, 1991) ..... 10

*McNeil v. Economics Laboratory, Inc.*, 800 F 2d 111, 118 (7th Cir., 1986) ..... 15

*Pennsylvania Department of Public Welfare v. Davenport*, ___ US ___, 110 S Ct 2126, 109 L Ed 2d 588 (1990) ..... 12

*Pension Benefit Guaranty Corporation v. LTV Corporation*, ___ US ___, 110 S Ct 2668, 110 L Ed 2d 579 (1990) ..... 12

*Robinson v. American Airlines, Inc.*, 908 F 2d 1020, 1023 (D.C. Cir. 1990) ..... 9

*Shore v. Federal Express*, 777 F 2d 1155 (6th Cir., 1985) ..... 16

*Tafflin v. Levitt*, ___ US ___, 110 S Ct 792, 107 L Ed 2d 887 (1990) ..... 9, 12

*Udall v. Tallman*, 380 US 1, 16 (1965) ..... 9

*Whittlesey v. Union Carbide Corp.*, 742 F 2d 724, 728 (1984) ..... 15

STATUTES

28 USC § 1254(1) ..... 2

§ 1331 ..... 2

§ 1332 ..... 2

29 USC §§ 621 et seq. ..... 15

49 USC § 1302(a)(1) ..... *passim*

§ 1302(a)(2) ..... *passim*

§ 1552 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE PROCEEDINGS

CAB Docket #40201, 1981 ..... 18

LEGISLATIVE MATERIALS

Cong. Rec. Senate, April 19, 1978, S. 5877. R. 71; A 20 ..... 19

S. Rep. No. 95-631, p. 114 (1978) ..... 14

MISCELLANEOUS

73 Am Jur 2d (1974) STATUTES Section 278 ..... 15

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, PAUL F. McDONALD, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion from the Court of Appeals for the Second Circuit is attached hereto as Appendix 1. Two published opinions and a memorandum and order by the United States District Court for the Southern District of New York, are appended hereto as Appendices 4, 5, and 6.

## OPINIONS FROM OTHER COURTS AND AGENCIES

The conflicting opinion of the Circuit Court of Appeals for the District of Columbia in *Crocker v. Piedmont Aviation, Inc.* is attached hereto as Appendix 8. The conflicting DOL Amicus Brief filed therein, Lodged, appended to McDonald's Brief on Appeal.

## JURISDICTION

The opinion of the Second Circuit Court of Appeals was filed on April 11, 1991. An order granting permission to extend time to file a petition to rehear, and to submit a

DOL Amicus Brief and the Affidavit of Air Safety Expert John J. Nance was signed on May 7, 1991. An order denying said petition was filed on June 24, 1991. Appendices 2 & 3.

The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1). The petition is timely.

## STATUTORY PROVISIONS INVOLVED

Sections 102(a)(1) & (2) and Section 43 of the Airline Deregulation Act of 1978 (49 USC §§ 1302(1) and (2), and § 1552) attached hereto at Appendix 9.

## STATEMENT OF THE CASE

McDonald sued Piedmont Aviation, Inc. in the United States District Court for the Southern District of New York for a violation of his First Right of Hire under Section 43(d) of the Airline Deregulation Act of 1978 (49 USC Section 1552(d)) seeking employment, with back pay and seniority. The court's jurisdiction was invoked pursuant to 28 USC Sections 1331 and 1332.

After trial, the jury found Piedmont had wrongfully failed to hire McDonald as of January 1982. At this point, McDonald was entitled to employment in his occupational specialty, i.e. pilot, with back pay and seniority as of that date. The trial Court, however, refused to grant the job, and awarded a "make whole" measure of monetary damages in its stead. Based on an exhaustive and uncontroverted economic expert's report on the earnings

differential McDonald would suffer, the jury awarded compensatory damages of $2,226,920.

On appeal, the Second Circuit Court of Appeals upheld the jury's finding of liability, and all of the trial Court's rulings, except as to measure of damages. The Appellate Court reduced the damages to seventy-two months of back pay, with no award of employment, by improperly engrafting the limit on Section 43(a) & (b)'s wholly separate government assistance program, onto damages for a wrongful failure to hire under Section 43(d).

## STATEMENT OF FACTS

Since the passage of Section 43 in 1978, the air carriers individually, and collectively through the Air Transport Association (ATA), have conspired to obstruct and defeat First Right of Hire in every possible way. From 1978 until November 1981 when Air New England failed, none of the hundreds of furloughed TWA, Pan Am and other protected pilots dared challenge a carrier by asserting Section 43 rights. Captain McDonald, a thirty-seven year old protected pilot from Air New England, was the first to assert that right at an airline, Piedmont, the only obligated carrier hiring significantly in 1981-82. All covered carriers had pilot hiring-age cut-offs in effect at that time: Piedmont's was thirty-two years of age.

McDonald pursued Piedmont until it arrogantly rejected him on May 28, 1982. McDonald, meanwhile, lobbied the DOL through the Spring of 1982 (See DOL file, Lodged), until his efforts, his rejection by Piedmont,

and the impact of a horde of protected Braniff pilots becoming available in May of 1982, aroused the DOL to impel Piedmont to comply with the Act.

Piedmont so complied from July 1982 until May 1984 (but it excluded McDonald), yet the rest of the ATA continued to stonewall, and succeeded in getting Section 43 struck down in *Alaska, et al v. Donovan*, 594 F Supp 92 (D.D.C. 1984), in May 1984, at which time Piedmont immediately ceased hiring protected pilots. The Supreme Court has since unanimously upheld the Act. *Alaska Airlines, et al v. Brock*, 480 US 678 (1987). Yet, even after the High Court's characterizing of the statutory language as "sufficiently unambiguous to notify carriers of their responsibilities", and calling the duty to hire "an affirmative duty the statute places directly on air carriers", 480 US at 687, the carriers arrogantly continue to stonewall the statute.

The reason for the carriers' objection to Section 43 is simple: older protected pilots' pensions are far more costly to fund than those of green new entrants. See Akins Report (Lodged herein). There he explains that Piedmont's present value cost to fund pensions of the younger unprotected pilots it hired prior to July 1982 was two hundred forty thousand dollars less per man than for the older protected pilots hired after July 1982. In fact, the incremental cost to Piedmont of its temporary change in policy, forced by McDonald and the Department of Labor, of hiring older protected pilots over the next two years, was over seventy-two million dollars (Akins Report, Lodged).

McDonald is the first, and only, of the thousands of protected employees whose Section 43 rights were flagrantly dishonored by an intransigent industry, who has managed to get as far as a jury trial.

## REASONS FOR GRANTING THE WRIT

### POINT I

The Court's understanding of the statute is in contradiction to that of an unanimous Supreme Court as expressed in *Alaska Airlines, Inc. v. Brock,* 480 US 678 (1987), at pages 687 through 697, and especially at page 694, and footnote 18 thereon.

### POINT II

The Court's understanding of the statute is in conflict with that of the Court of Appeals for the District of Columbia, which overturned the case upon which this Court heavily relied in setting the measure of damages, and that of the Department of Labor as set forth in an Amicus Brief filed therein.

### POINT III

The Court misapprehends the plain meaning of the statute in importing Section 43(e)'s limitations on assistance payments of seventy-two months to the wholly separate First Right of Hire created in Section 43(d)(1).

## POINT IV

The truncated measure of damages frustrates the intent of Congress in establishing the rehire program both to protect airline careers and to reinvest the irreplaceable experience of protected pilots to maintain the highest standards of safety in the industry that had been built up over decades of regulation.

## POINT V

The truncated measure of damages defangs the only available mechanism to enforce First Right of Hire, and leads to the absurd result of rewarding carriers for wantonly flouting the will of Congress.

## ARGUMENT

### THE COURT ERRED IN FOLLOWING REASONING IN *CROCKER* THAT HAS ALREADY BEEN REJECTED BY THE SUPREME COURT.

The McDonald Court's error in setting a measure of damages lies in adopting the reasoning in *Crocker v. Piedmont*, No. 86-1673 (RCL)(D.D.C. Feb. 8, 1990). It is odd that the Court would seek guidance from a District Court which clearly misunderstood the statute rather than from the Chief Judge of the S.D.N.Y., whose understanding of the statute has been ratified by a unanimous Supreme Court. *Alaska et al v. Brock*, 480 US at 687, footnote 9.

The *Crocker* Court made a fundamental error in importing into the First Hire program of Section 43(d)(1)

a limitation on the other prong of the statute, the assistance program created in Section 43(a). It assumed that a limitation on assistance payments in Section 43(b), obviously intended to protect federal revenues, should also limit First Right of Hire; that because assistance payments were to be reduced by the amount of earnings at "comparable employment", i.e. with a non-obligated carrier, that is, one not certificated as of October 23, 1978, such employment should also extinguish First Right of Hire. To do so, the Court, in effect, rewrote the statute. Section 43(d)(1) clearly intends that the goal of First Right of Hire is a job with an obligated carrier, and is not extinguished *except* by a job with such a carrier. See DOL Amicus Brief (Lodged) and Nance Affidavit, Appendix 10.

The McDonald Court, following *Crocker*, makes precisely the same error when it held that "the jury could not have determined that the employment (at Air Berlin) was reasonably comparable (to Piedmont)". Opinion, page 15. This statement necessarily implies that the Court, had it found the Air Berlin job comparable, would have held that said job extinguished McDonald's First Hire Rights at Piedmont.

The Court goes on to compound its error by assuming that the Congress would have intended that damages for a breach of Section 43(D)(1)'s duty to hire should be limited by the seventy-two month limit on assistance payments in Section 43(e).

The Court's error is based on its following *Crocker* (D.D.C.) in assuming that "the duty to hire provision was adopted as a supplement for" the assistance program

(quoting *Crocker*, at page 14), and in characterizing the First Hire program's "purpose as a supplement to the temporary monthly assistance payments" (p. 14). It further erred, again following *Crocker*, in assuming that the two prongs of Section 43, the assistance program and First Right of Hire, were so interwoven and tightly linked that the Congress intended the various limits on assistance payments should also limit First Right of Hire.

But the Supreme Court had already unanimously rejected the notion that the two prongs of Section 43 are "tightly linked", stating that the First Hire program "could stand alone as the sole means of employee protection", and that the *assistance program*, not First Hire, "was regarded (by Congress) as the *second line* of attack" (emphasis added), 480 US at 694, footnote 18.

By concluding that the two programs were separate, and that Congress intended to give primacy to First Hire as the favored means of employee protection, the Supreme Court has already refuted the reasoning of *Crocker*, on which the Court so heavily relied.

## THE COURT'S DECISION IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE DEPARTMENT OF LABOR.

The Appellate Panel in *Crocker v. Piedmont* (C.A.D.C. Cir., No. 90-7021, May 24, 1991) requested the DOL to file an Amicus Brief on the issue raised below, whether a job with a non-covered carrier extinguished First Hire Rights. The DOL wholly disagreed with the District Court. See DOL Brief, lodged herein appended to McDonald's Petition to Rehear.

The *Crocker* Panel then held that "because Congress expressly charged the Department with administering the EPP, its interpretation is entitled to deference unless inconsistent with the statutory language", citing *Robinson v. American Airlines, Inc.*, 908 F 2d 1020, 1023 (D.C. Cir. 1990). *Crocker*, supra, 933 F 2d at 1027. See also *Udall v. Tallman*, 380 US 1 (1965) and *Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 US 837 (1984).

The *Crocker* Panel then reversed the lower Court, stating:

> "We reject the district court's analysis for the following reasons.
>
> First, the EPP itself imposes no limits on the length of a protected employee's first-hire right and we do not believe the statutory restrictions on financial assistance should be engrafted on the first-hire provisions.[3]

---

[3]In fact, given the express statutory restrictions on the financial assistance benefits, the absence of any similar limitations on the first-hire right suggests that Congress intended to impose none."

This well-established rule of interpretation was hardened beyond "suggestion" in recent Supreme Court cases:

> " 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' *Russello v. United States*, 464 US 16, 23, 78 L Ed 2d 17, 104 S Ct 296 (1983) (internal quotations omitted); see *General Motors Corp. v. United States*, 496 US ___,

110 L Ed 2d 489, 110 S Ct 2528 (1990)." *Gozlon-Peretz v. U.S.*, 112 L Ed 2d 919, 930 (1991).

The *Crocker* Appeals Panel explicitly points out its conflict with the *McDonald* Appeals Panel:

> "In declining to apply those restrictions to the first-hire provisions, we may be at variance with the Second Circuit's recent decision in *McDonald v. Piedmont Aviation, Inc.*, No. 90-7328 (2d Cir. April 11, 1991), which relied on the financial assistance restrictions to limit to seventy-two months the amount of back pay recoverable by a protected employee who is denied his first-hire right. Id. at 12-15," (Opinion page 7, footnote 4).

## THE COURT BELOW IMPERMISSIBLY REWROTE THE STATUTE.

The Court of Appeals' interpretation of Section 43 ignores the Supreme Court's repeated admonishments that statutes enacted by Congress and signed by the President must be enforced by their express terms, and that when a statute contains specific language in one Section, and not in another, the Congress so wrote it intentionally.

"As in all cases involving statutory construction, 'our starting point must be the language employed by Congress' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' Thus '(a)bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive' ". This literal construction "is particularly cogent" where, as is obviously the case with the ADA and Section 43, the Congress has painstakingly considered the

law in its debate and drafting. *American Tobacco Company v. Patterson*, 465 US 63, 68 (1982).

The Court of Appeals' error was in following the lead of *Crocker v. Piedmont Aviation, Inc.*, No. 86-1673 RCL (D.D.C. August 11, 1989), where the District Court imported a limitation from Section 43(b) on the government assistance payments into Section 43(d)'s First Hire program to cut off a protected pilot's right to be hired at Piedmont because he had taken temporary employment with a non-covered carrier.

The Second Circuit Panel in *McDonald* made precisely the same error, and then compounded it by assuming that because Congress sought to limit in Section 43(e) to seventy-two months the government assistance payments created in Section 43(a) and (b), it would or should also have so limited damages for a wrongful failure to hire under Section 43(d)(1).

*The Congress, however, did no such thing*! This was purely an invention of the Court, which literally rewrote the statute. The seventy-two month limit in Section 43(e) applies to exactly what it says it does in its *black letter* heading, that is to the ***"Period of monthly assistance payments."*** The Congress did not add thereto the words ***"and of damages against a carrier for a breach of duty to hire"***.

Nor is there any indication anywhere in the language of Section 43(d) or Section 43(e), nor anything in the legislative history, to suggest Congress ever contemplated such a limitation on damages under Section 43. Where the legislative history "reveals no evidence that Congress even considered" the issue, and "even if (the Court)

could reliably discern what Congress' intent might have been had it considered the question," the courts may not "speculate", as the *McDonald* Court did, on what Congress' choice may have been. *Tafflin v. Levitt*, supra, 110 S Ct at 796.

In going beyond the literal meaning of Section 43(e) to "engraft it" onto Section 43's First Right of Hire, the Court of Appeals overlooked the recent Supreme Court decisions involving suggestions to imply language which was not expressly set forth in the relevant statutes. *Guidry v. Sheet Metal Workers National Pension Fund*, ___ US ___, 110 S Ct 680, 107 L Ed 2d 782 (1990); *Crandon v. United States*, ___ US ___, 110 S Ct 997, 108 L Ed 2d 132 (1990); *Pennsylvania Department of Public Welfare v. Davenport*, ___ US ___, 100 S Ct 2126, 109 L Ed 2d 588 (1990); *Pension Benefit Guaranty Corporation v. LTV Corporation*, ___ US ___, 110 S Ct 2668, 110 L Ed 2d 579 (1990); *Tafflin v. Levitt*, ___ US ___, 110 S Ct 792, 107 L Ed 2d 887 (1990).

These cases make clear that absent "rare and exceptional circumstances" (*Crandon*, supra 110 S Ct at 1006), Federal statutes are to be read and applied literally if the literal meaning is consistent with one of the purposes of the Act. Even when a literal reading leads to an "anomalous" result (*P.D.P.W. v. Davenport*, supra 110 S Ct at 2132) or one that "may seem strange" (*Crandon*, supra 110 S Ct 1010) the literal reading of the statute must be applied.

And, the High Court recently rebuked a party for ignoring "this Court's commitment to 'giving effect to the meaning and placement of the words chosen by Congress'. *Adams Fruit Co. v. Barrett*, 494 US ___, ___, 108 L Ed

2d 585, 110 S Ct 1384 (1990)", *Hughey v. United States*, 109 L Ed 2d 408, at 416 (1990).

Finally, in those "rare and exceptional circumstances" where a Court has been allowed to read words into a statute, it has been done only to further the intent of the statute. The Court's error here does so to nullify the intent of Congress.

## THE EXPRESS TERMS OF THE STATUTE AND ITS LEGISLATIVE HISTORY MANDATE A MAKE WHOLE REMEDY.

The absence of an explicit enforcement mechanism for First Right of Hire, and remedy for a breach thereof, indicate that the Congress naively expected carriers to obey their mandated duty to hire protected employees. The Congress never contemplated a remedy because it expected no need for one. The carriers' wholesale defying of their obligations, however, requires the Court to fashion a remedy consistent with the intent of Congress to protect careers and reinvest experience to maximize safety.

"Where a legal injury is of an economic character, '(t)he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' *Wicke v. Hoppock*, 6 Wall 94, 99, 18 L Ed 752 (1867)." *Albemarle Paper Co. v. Moody*, 422 US 405, 418-19 (1975).

The *Albemarle* Court was interpreting Title VII of the Employment Discrimination Act and points out that in that statute the Congress had "take(n) care to arm the Courts with full equitable powers" (122 US at 418). In fashioning a remedy on damages for Section 43, the Court is obviously invoking its equitable powers. There is every reason to believe that to protect Section 43 rights, where the Congressional purpose was to undo harm suffered by a class of individuals caused by its own hand, the legislature also would have "armed the Courts with full equitable powers".

> "Where Federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief . . . For it is the historic purpose of equity to 'secure complete justice'." *Albemarle*, and cases cited therein, 422 US at 418.

The *Albemarle* Court goes on to state that "the 'make whole' purpose of Title VII is made evident by the legislative history", 422 US at 419. Likewise, the legislative history cited by a unanimous Supreme Court in *Alaska*, at 480 US 678 (1987), and the Court's thorough exegesis of the express language of the statute, argue powerfully that a "make whole" remedy is required for violations of First Hire Rights under Section 43.

Anything short of a make whole remedy would indeed cause the "benefits to the public" to be paid for "by a minority – airline employees and their families who have relied on the present system", S. Rep. No. 95-631, p. 114 (1978). The Report specifically points out that "older employees . . . might encounter difficulties because of

their age," and the statute mandates the right applies "regardless of age", Section 43(d)(1). Because Captain McDonald was denied his right precisely because of his age, and because he and his family have suffered, and will continue to suffer, substantial pay differentials, the clear Congressional intent to protect his career, short of re-employment, can only be effected by making him whole.

## BECAUSE THE COURT PRECLUDED AN AWARD OF EMPLOYMENT, FRONT PAY IS NECESSARY TO MAKE MCDONALD WHOLE.

In his complaint, McDonald asked for and would far have preferred, an award of back pay and employment with seniority as of the date of the wrongful failure to hire. The trial Court, however, took the position that it would be improper to compel an air carrier to hire a person for so sensitive a position as pilot. In the absence of a hiring remedy, front pay becomes essential. Without it, McDonald and his dependents would be left to suffer a continuing deprivation of some one hundred thousand dollars per year and a total loss of retirement benefits. See the Akins Report (Lodged).

And, Section 43(d) is obviously a remedial statute and thus is "entitled to a liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute," 73 Am Jur 2d (1974) STATUTES, § 278.

> "Denial of reinstatement in those situations, without an award of reasonable, offsetting compensation, would leave the plaintiff irreparably

> harmed in the future by the employer's discriminatory discharge, and would permit the defendant's liability for its unlawful action to end at the time of judgment. To prevent this injustice a reasonable monetary award of front pay is necessary as 'equitable relief . . . appropriate to effectuate the purposes of (the ADEA).' 29 USC Section 626(b)." *Whittlesey v. Union Carbide Corp.*, 742 F 2d 724, 728 (1984).

Because McDonald and the other LPP's were denied First Hire precisely because of their age, it is logical to look to the Age Discrimination in Employment Act (29 USCS §§ 621 et seq); in fashioning a remedy for breach of duty to hire. All the circuits that have decided the issue have held that front pay is an available remedy in appropriate cases under the ADEA. *McNeil v. Economics Laboratory, Inc.*, 800 F 2d 111, 118 (7th Cir., 1986) citing cases from the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th and 11th Circuits. These cases indicate the Circuits are in agreement on the following: that front pay is especially appropriate where reinstatement is inappropriate, that front pay is a matter within the discretion of the trial judge, that the intent of front pay is to make the victim whole where a job is not possible, that the award of front pay is reviewable only for abuse of discretion, and that there must be some rational basis in the evidence for the award. See also *Shore v. Federal Express*, 777 F 2d 1155 (6th Cir. 1985).

## UNCERTAINTY DOES NOT BAR AN AWARD OF FRONT PAY.

Courts are commonly called upon to determine future damages in many different kinds of cases. All such

determinations necessarily involve a degree of uncertainty. To allow that uncertainty to prevent recovery whenever damages cannot be precisely determined, would be to deny a remedy to a large percentage of those injured and to unjustly reward wrongdoers.

> "The mere fact that damages may be difficult of computation should not exonerate a wrong-doer from liability. The most elementary notions of justice and public policy require that a wrong-doer shall bear the risk of the uncertainty which his wrong has created," *Bigelow v. RKO Radio Pictures*, 327 US 251, 265 (1946).

Because of the nature of the pilot contracts in the industry, projecting McDonald's future damages involves far less uncertainty than is usually the case. McDonald's economic expert, Daniel W. Akins, who had evaluated union contracts at ALPA, crafted a clear and careful report, documenting the earnings differential McDonald had suffered, and could expect to suffer, and thoroughly explained it to the jury. See the Akins report and the discussion of it in McDonald's Brief on Appeal, both Lodged herein. The jury was sufficiently impressed with its cogency to return to the penny Akins' estimate of his damages. See Akins Report Addendum Table 3 (Lodged).

## IT IS ILLOGICAL, UNJUST, AND AGAINST THE INTENT OF CONGRESS TO CUT OFF MCDONALD'S DAMAGES AS OF JANUARY 1988 WHEN HIS FIRST RIGHT OF HIRE, PIEDMONT'S OBLIGATION TO HONOR IT, AND HIS DAMAGES, ALL ARE ONGOING.

As the DOL persuasively argues in its Amicus Brief, the goal of Section 43 is for protected pilots to obtain jobs

with covered carriers, that is, those certificated as of 23 October 1978. That right is not extinguished, and the primary purpose of Section 43 is not met, until such employment is obtained.

The DOL assumes, quite logically, that First Right of Hire, once obtained during the ten year period survives the ten year period. See the DOL letter to George Paul of United Airlines, stamped 3 January 1991, appended to the DOL Brief (Lodged) in Addendum C. Although there is an expiration date of 24 October 1988 on the opportunity to obtain First Right of Hire, there is no expiration date in Section 43(d) on the duty to honor it.

McDonald acquired First Right of Hire on 31 October 1981 when Air New England terminated. Since he has been unable to obtain work with any covered carrier since, his right survives to this day. The job at Air Berlin could not extinguish his right, nor relieve Piedmont of its obligations.

Note that McDonald reapplied to Piedmont in 1987 and was rejected as unqualified. See McDonald and Piedmont letters at Addendum A of McDonald's Brief on Appeal (Lodged).

When a pilot who is protected under Section 43(h) acquires First Right of Hire under Section 43(d)(1), he does not yet become eligible for government assistance. His job loss must be found to be the result of a "qualifying dislocation", §§ 43(a) & (h)(2). McDonald was never eligible because the CAB did not find Air New England's demise the result of a "qualifying dislocation" (CAB

Docket #40201, 1981). In fact, no one has ever been eligible, because no "qualifying dislocation" has ever been found by any agency!

Yet that never stripped anyone of his protected status as defined in Section 43(d)(1) and (h)(1). First Right of Hire is the only aspect of the entire protective provisions to functionally exist. How can the seventy-two month limitation, applied to assistance payments which never existed, for employees who never qualified, be used as a means to reduce a jury award predicated on the make whole remedy in lieu of hiring?

If McDonald had sued the government for assistance benefits, the seventy-two month limit would properly apply. But McDonald sued a carrier for the job that the statute, the jury's verdict, and the upholding of that verdict as to liability, entitle him. The limit in "Period of monthly assistance payments" has no revelance to this remedy.

The initial error of *Crocker* (D.C.C.) was made because the Court felt it a "strange result" that the Congress would put a greater burden on the carriers than on the government. The legislative history makes clear, however, that this is precisely what was intended. In introducing the First Hire provision, intended as a replacement for the monthly assistance provisions, because of concerns about burdening the public purse, Senator Zorinsky stated:

> " . . . instead of affording the relief of compensation from the pockets of the Nation's taxpayers, my amendment provides that qualified protected employees be given a preference in hiring

> by other carriers . . . I ask my colleagues, why resort to the pocket of the taxpayer when the airline industry itself can provide the relief." (Cong. Rec. Senate, April 19, 1978, S. 5877. R. 71; A. 20).

The Court has held that the jury correctly found McDonald's rightful date of hire to be January 1982. Every time Piedmont has hired a non-protected pilot since then, Captain McDonald has suffered a new and continuing violation of his First Right of Hire. Piedmont violated his rights anew after rejecting him in 1987, with the very next hiring of a non-protected pilot. If Piedmont hires such a pilot tomorrow, it will again violate McDonald's right to be hired first.

How can the Court limit damages as of January 1988 when Captain McDonald's right to be hired first still lives? The ongoing violation of his right, and the concomitant monetary deprivation, will continue until the end of his career. Unless the Court orders Piedmont to give McDonald what Congress ordered it to give, a job, there is virtually no prospect that McDonald will ever obtain what the Congress intended him to have, a career with a covered carrier.

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If the Court does order Piedmont to hire Captain McDonald, is it rational to limit his damages to the period prior to January 1988? Why should he not recover back pay until his date of actual hire, as Courts have always allowed in wrongful failure to hire cases? And if the Court does not award a job with proper seniority and back pay, what is to compensate McDonald for his ongoing loss, now and in the future?

The DOL argues persuasively that the goal of Section 43 can only be met by McDonald's getting a job as a pilot with a covered carrier. If this Court denies him that job, it must fairly compensate him for that loss. And the only possible measure of that loss is the economic value of the job itself. Anything less than the make whole remedy applied below will dilute and diminish his right granted by Congress, denied by an intransigent industry, and vindicated by a jury.

## THE CONGRESSIONAL PURPOSES IN ENACTING FIRST RIGHT OF HIRE ARE TOTALLY FRUSTRATED BY THE TRUNCATED MEASURE OF DAMAGES.

There is no enforcement mechanism beyond the DOL's power of moral suasion in Section 43(d)(2) to compel carriers to comply with their duty under 43(d)(1). Hence a pilot whose First Hire rights have been denied can seek redress only in the private right of action found implied in the Act by the trial Court, and ratified by the Supreme Court in *Alaska et al*, 480 US at 687, footnote 9. The Court has, by improperly limiting damages to six years, defanged the only remedy available. Hence the carriers are free to continue flaunting their duty, and the ends of Section 43(d)(1) will continue to be frustrated in toto.

The report of McDonald's economic expert, Akins, found that, on the average, Piedmont saved $240,000 per man each time it hired a non-protected pilot in the stead of an older protected pilot. In McDonald's case, the truncated damages would come to somewhere between two hundred to four hundred thousand dollars, depending on which of Akins' assumptions the Judge or a new jury

chose to accept. There would be great pressure on McDonald to settle for far less to avoid the vagaries of a new proceeding. As a consequence, Piedmont would roughly break even for its denial of McDonald's rights. And, since McDonald is the *only* pilot to get to trial, Piedmont and its cohorts have enjoyed a large windfall profit in each of the thousands of other instances in which they wilfully defied the mandate of Section 43(d)(1).

McDonald, on the other hand, after the considerable expenses of seven years of litigation, prosecuted from abroad, and legal fees, contingent and otherwise, is left with virtually nothing, and no prospect of obtaining the comfortable career promised to him by the Congress.

The jury found Piedmont liable for its wrongful failure to hire McDonald as of January 1982. That finding, upheld on appeal, necessarily includes over one hundred and sixteen months of back pay and the right to exercise his seniority and begin work as a Captain at the airline, a position to which he is eminently qualified, having flown over six thousand hours in the same Boeing 737-200, -300, and -400 series airliners Piedmont operates, and over five thousand of those hours as a Captain, in Europe, North Africa and the Middle East, during the intervening years of this litigation.

In *Alaska et al*, a unanimous High Court exhaustively plumbed the legislative history of Section 43 to find that the prime purpose of Section 43(d)(1) was to protect careers, 480 US 687-697.

An even more critical goal of Section 43 was to reinvest the acquired experience of protected workers to fulfill the first two goals of the Airline Deregulation Act set forth in §§ 102(a)(1) & (2) thereof (49 USC §§ 1302(a)(1) & (2)), Appendix 9. When Congress deregulated the industry economically, it had no intent to deregulate safety. The Civil Aeronautics Board (CAB), which oversaw the economic regulation of the industry, was sunsetted by the ADA. But the Congress kept intact the oversight bodies in charge of insuring safety: the Federal Aviation Administration (FAA), and the National Transportation Safety Board (NTSB). And in placing the goals of maintaining the highest standards of safety ahead of the economic goals in Section 102 of the ADA, it renewed its mandate to give safety the highest priority.

To further strengthen and facilitate this mandate, Congress created Section 43(d)(1) to recycle invaluable experience. This is why Congress chose First Right of Hire to be the primary means of employee protection, and relegated the assistance program to a transitory and secondary line of attack. See Nance Affidavit throughout, Appendix 10.

Subsection 1, in effect, makes the maintenance of safety a condition precedent to any changes induced by the Act. Subsection 2 sheds a somber light on how the Congress would view the carriers' substituting cheap new entrants for LPP's, with their wealth of accumulated experience in and knowledge of the industry. No one can argue seriously against the proposition that the loss of accumulated knowledge and experience of LPP's can only work against "the prevention of any deterioration in established safety procedures" or the "furtherance of the

highest degree of safety . . . that has evolved in air transportation", (§ 102(a)(2)). The Congress, in effect, would have sacrificed the economic benefits of deregulation on the altar of safety: the carriers have reversed that priority, and, by hiring new entrants over experienced LPP's, have, in fact, sacrificed safety on the altar of greed.

And finally, Section 43(d) obviously was enacted to ease the passage of the deregulation bill. It was, in effect, a covenant of the Congress to labor that if the powerful industry unions accepted deregulation, they would be guaranteed quality jobs with the surviving established carriers.

To understand the interplay of the multiple purposes of the ADA of 1978, and of Section 43 in particular, one needs only to consider what the Supreme Court gleaned from the legislative history.

> "But in response to union testimony that the existing protections were inadequate, and the support for labor-protection provisions expressed by administration witnesses, the compensation program and first-hire provisions were added as Section 22 of S.2493, the bill introduced in the second session. With the inclusion of the labor provisions, the bill was viewed as 'strik(ing) the proper balance between legitimate demands of industry, consumers, labor and management.' 124 Cong Rec 10654 (1978) (remarks of Senator Percy)." *Alaska et al*, 480 US at 691-2.

This "proper balance" was the balancing of the desires of management for the freedom and profit opportunities of deregulation, of the consumers' interest in

lower fares, of both the consumers' and the industry's critical need for maintenance of the highest standards of safety, and of labor's desire to continue to have careers with covered carriers.

But what kind of protection was labor bargaining for? Anyone familiar with the industry knows that it was not assistance payments or moving expenses that labor was seeking. ALPA and the other unions wanted jobs, and not just any jobs, but *career protecting* jobs with the existing established carriers, with all of the prestige, pay, benefits, union protection and security that labor had so arduously built up over decades under regulation.

So what has happened to this bargain struck by the Congress between competing interest groups? Management got its profit opportunities and freedom, but then decided to take the money and run. In order to save the extra pension costs of invaluably experienced pilots, the obligated carriers have virtually totally refused to honor their obligations under the First Hire program. Corporate arrogance and greed have made a mockery of the Congress' guarantee of the highest standards of safety (See Nance Affidavit, Appendix 10) and left a broad swath of careers and families that Congress promised to protect, destroyed and devastated.

And, parenthetically, the ADA's main goal of lowering fares and improving service by increasing competition has also been thwarted. A once vibrant industry, with fifty-one certificated carriers (as of 24 October 1978), has been reduced to an oligopoly of eight, four of whom may soon be swallowed by the remainder, which has control of ninety-three percent of the business.

At stake here are vital national public policy issues. Can this Court allow corporate greed to mock the covenant of Congress to the flying public that safety should suffer no dimunition? Or the covenant of Congress to airline personnel that their careers would be protected by jobs with established carriers on the other side of the chaos caused by Congress' own hand in deregulating?

At issue, too, is the very integrity of the legislative process itself. If the Congress is to be able to strike bargains in the future between competing interest groups, these groups must have faith that the Congress is *more* than a purveyor of empty promises.

For the Court to defang First Hire's only enforcement mechanism with a remedy so truncated as to profit carriers to dishonor First Right of Hire, is to assume Congress would sanction the carriers' open defiance of its will, and the carriers' open breaching of their end of a bargain so laboriously and fairly struck. No such intention can be ascribed to a presumably intelligent and rational legislature.

The Court correctly held that its function is to fashion a remedy "in light of the statutory language and purpose and of the traditional modes by which Courts compel performance of legal obligations". Opinion, page 13. The Opinion then internally contradicts itself by misunderstanding the plain meaning of the statute, and its intended purposes, and fashions a remedy that is, in effect, no remedy at all. As Chief Judge Brieant held below, "Without a remedy, there is no right". *McDonald v. Piedmont*, 625 F Supp 762, 765 (1986).

## CONCLUSION

Piedmont will ask this Court to allow it to import limits from one prong of the program to the other to protect itself from its own wrong-doing. The Congress could not have intended that a carrier be able to flaunt the mandate to hire protected pilots first, and then be able to limit its damages with protections erected for public monies.

WHEREFORE, for the foregoing reasons, Paul F. McDonald respectfully requests that this Court grant his Petition for Writ of Certiorari or, in the alternative, to reverse as to damages and reinstate the full verdict of the jury.

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## APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 204 – August Term, 1990

Argued: September 27, 1990 Decided: April 11, 1991

Docket No. 90-7328

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PAUL F. MCDONALD,

*Plaintiff-Appellee,*

– against –

PIEDMONT AVIATION INC.,

*Defendant-Appellant.*

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Before:

LUMBARD, NEWMAN, and ALTIMARI,

*Circuit Judges.*

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Appeal from judgment of the Southern District of New York, Brieant, *C.J.*, entered in favor of plaintiff on March 29, 1990, after a jury trial. Jury found that defendant denied plaintiff a "first right of hire" under Section 43(d) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552(d) (1988); it awarded compensatory damages of $2,226,920.

Affirmed in part; reversed in part and remanded for further proceedings to calculate damages.

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LOUIS B. KIMMELMAN, New York, N.Y. (O'Melveny & Myers, New York, N.Y., Jeffrey I. Kohn, of counsel), *for Defendant-Appellant.*

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LUMBARD, *Circuit Judge*:

Piedmont Aviation Inc. appeals from the March 29, 1990 judgment of the Southern District of New York, Charles L. Brieant, *Chief Judge*, entered after a jury trial. The jury concluded that Piedmont had denied McDonald a "first right of hire" under Section 43(d) of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 1552(d) (1988); it awarded compensatory damages of $2,226,920 for the expected duration of McDonald's career.

We affirm the finding of liability, reverse the damage award, and remand for further proceedings to determine damages available to McDonald under Section 43(d) for the period of 72 months from the denial of employment.

In 1978, Congress enacted the ADA as part of its deregulation of the commercial airline industry. Congress sought to ensure that the benefits to the public flowing from this deregulation would not be "paid for" by airline employees who had relied on the heavily regulated nature of the industry in deciding to accept and to retain

positions with commercial air carriers. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 680 (1987). The Senate Committee Report expressed its reasons for providing protection for individual airline employees as follows:

> [A]n individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be ab[l]e to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.

S. Rep. No. 631, 85th Cong., 2d Sess. 114 (1978).

To assist employees dislocated as a result of deregulation, Congress enacted an employee protection program in Section 43 of the ADA. *Id.* at 68-81. Section 43 provides for benefits, in the event of work force reduction, to those who are "protected employees."[1] *See* 49 U.S.C. § 1552. Section 43, subsection d, imposes on airlines certified under the prior regulatory system a "duty to hire" protected employees whenever additional employees are hired:

> Each person who is a protected employee of an air carrier which is subject to regulation by the

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[1] A "protected employee" is a person "who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this title [49 U.S.C.]," excluding any members of the board of directors or officers of a corporation, 49 U.S.C. § 1552(h)(1).

> Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person . . . .

49 U.S.C. § 1552(d)(1).

On October 31, 1981, McDonald, a pilot for Air New England since May 15, 1972, was terminated when the airline ceased all operations. Because McDonald had been employed by the carrier for more than four years, he was a protected employee under Section 43(d). Piedmont concedes that it is subject to Section 43(d)'s duty to hire protected employees.

On November 19, 1981,[2] McDonald submitted a job application to Janet Cook, who was the secretary of

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[2] McDonald testified that during a November 2 appointment with Bill Hall, Piedmont's director of training, he gave Hall a supplemental application form, which McDonald had created. Hall accepted the document and gave McDonald a Piedmont application form. On November 19, McDonald delivered the completed application to Piedmont.

At trial, McDonald argued that November 2 was the date he applied; Piedmont contended that it was November 19. Because the difference is not relevant to this appeal, we only note the parties' disagreement.

Captain Fred D. Womack, Piedmont's director of flight operations and flight safety, one of three persons at Piedmont who interviewed pilot applicants. McDonald's application included his relevant work history; he stated that he left Air New England because the company had been "liquidated."

When McDonald delivered his application to Cook, she told him that he should also submit a resume and his Air New England flight time summary and that he should take steps to be qualified as a flight engineer.

McDonald testified that he sent his resume and flight summary to Piedmont on December 2. On December 14, McDonald took a written examination to qualify as a flight engineer. He learned the results of this examination in two or three days and, within about a week, he telephoned Cook and informed her that he had passed the examination. After receiving written confirmation that he had passed the examination, he mailed the results to Piedmont on January 1, 1982.

Piedmont was hiring pilots at the time McDonald submitted his application. Classes of pilots began training on November 16, November 30, January 4, May 24, and June 7. Each of the five classes consisted of approximately 16 pilots; none of the trainees was a protected employee under Section 43(d).[3] In addition, these pilot trainees

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[3] After the June 7 class, Piedmont adopted a policy of hiring only protected pilots.

were considerably younger than McDonald, who was 37. None of the trainees was older than 32. The average age of the members of each class was less than 29. There was evidence that because the FAA mandates that pilots retire by age 60, it is considerably more expensive for an airline to fund the pensions of pilots hired at an older age. Piedmont calculated the average age of these classes to the tenth of a year.

Piedmont did not acknowledge receipt of McDonald's application, request additional information, or interview McDonald for a pilot position. On February 1, McDonald wrote Piedmont, specifically calling attention to its duty to hire him under Section 43(d). McDonald wrote a second letter on April 21, in which he restated Piedmont's duty to hire protected pilots regardless of age. On April 30, McDonald went to Piedmont's training center in person to confirm that Womack had received the second letter.

At trial, Cook testified that, on April 30, McDonald came to her office without an appointment and asked if Womack would see him. Cook told McDonald that Womack was in a meeting. McDonald then inquired whether Womack had received the April 21 letter; Cook responded that she did not know. Cook took a copy of McDonald's letter to Womack and asked if he had seen it. Womack told Cook that he had, but that he would not see McDonald.

When Cook returned to her office and told McDonald what Womack had said, McDonald remained in her office staring at her. She said that McDonald's face became red and he seemed upset. McDonald asked Cook why

Womack had not responded to his letter; he asked if Cook "understood his position." Finally, he told Cook that he was going to have to do something he did not want to do, which would be an embarrassment to him and Piedmont. McDonald stood in Cook's office for a few more seconds, then left.

Cook testified that she was upset and went into Womack's office and told him what happened. Womack reported the incident to Piedmont's personnel director, Ray Welch. In a telephone conversation on May 21 and in a subsequent letter, Welch told McDonald that because of the April 30 incident Piedmont would give his employment application no further consideration.

Following notice of Piedmont's decision not to hire him, McDonald continued to apply to other airlines and worked temporarily as a pilot for private individuals and organizations. In May 1983, he took a job with Trans East International Airlines and piloted small Cessna and commuter aircraft. In October 1983, McDonald obtained a pilot's position at Air Berlin, Inc., a small charter company based in Berlin, Germany, where he continued to be employed at the time of trial.

McDonald's salary at Air Berlin is considerably less than it would have been at Piedmont. According to the earnings estimates of McDonald's expert, Daniel W. Akins, which the jury credited fully in determining a verdict, in 1984, McDonald probably would have earned $68,656 at Piedmont; his actual earnings at Air Berlin were $33,212. In 1989, McDonald earned $63,149; his likely earnings at Piedmont would have been $136,777. Akins estimated that this differential would continue to

increase through the duration of McDonald's career. While his earnings at Air Berlin would stabilize at about $60,000, his salary at Piedmont and USAir (Piedmont's successor corporation) would eventually exceed $182,000.

In November 1984, McDonald brought an action against Piedmont in the Southern District, alleging that Piedmont denied him a first right of hire under Section 43(d). After a trial in March 1990, the jury returned a verdict for McDonald for $2,226,920, the full amount of lost wages and employee benefits sought by McDonald from January 1982 through the expected duration of his career, to age 60. On appeal, Piedmont challenges the finding of liability and the damage award.[4]

Piedmont first contends that the district court erred in applying a three-year Massachusetts statute of limitations to this action. Piedmont argues that the district court should have applied the six-month statute of limitations for actions brought under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(3) (1988), or the two-year statute of limitations for claims arising under the labor protective provisions of the Interstate Commerce Act, 49 U.S.C. § 11706(c)(1) (1988). Under either of these proposed alternatives, McDonald's claim would be barred. We disagree with Piedmont's position, substantially for the reasons set forth in the district

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[4] The parties do not dispute and we agree that there is an implied right of action under Section 43(d). *See Long v. Trans World Airlines, Inc.*, 913 F.2d 1262, 1265 (7th Cir. 1990); *McDonald v. Piedmont Aviation Inc.*, 625 F. Supp. 762, 764-65 (S.D.N.Y. 1986); *cf. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 687 n.9 (1987).

court's September 7, 1988 Memorandum and Order. *See McDonald v. Piedmont Aviation Inc.*, 695 F. Supp. 133 (S.D.N.Y. 1988).

Because Congress did not provide a statute of limitations for Section 43(d), the court must "borrow" one from another source. *See Agency Holding Corp. v. Malley-Duff & Associates Inc.*, 483 U.S. 143, 146 (1987). Courts have generally concluded that Congress intended them to apply the most closely analogous statute of limitations under state law. *See id.*

Applying the *Agency Holding* analysis, the district court concluded that the primary federal policy at stake in a Section 43(d) claim – the assistance of dislocated employees – would not be frustrated by the application of a state rule and, therefore, does not require the application of a federal statute of limitations. *See McDonald v. Piedmont*, 695 F. Supp. at 136, 137. The district court found no reason to vary from the longstanding practice of adopting a state statute of limitations in the face of Congressional silence. *See id.* at 136. It then applied the New York borrowing statute, Sec. 202 N.Y. Civ. Prac. L. & R., under which it determined that a Massachusetts statute of limitations should apply, as McDonald was a Massachusetts resident and his claim accrued there. *See id.* at 138. We agree with the district court's application of the three-year Massachusetts statute of limitations for actions of tort. *See id.*

Second, Piedmont challenges the district court's exclusion of evidence purportedly relevant to McDonald's qualifications for employment. This evidence includes: 1) testimony of two persons who interviewed

McDonald for employment at other airlines; 2) portions of McDonald's employment and military records; and 3) testimony of a purported expert on pilot selection profiles. Piedmont argues that this evidence would have demonstrated that McDonald was unqualified for employment at Piedmont and, therefore, was not entitled to a first right of hire under Section 43(d).[5] However, Piedmont concedes it did not have any of this information at the time it refused to hire McDonald.

Piedmont contends that the district court erred in vacating its notice to depose Captain Michael G. Fortune, who interviewed McDonald for employment at People Express Airlines, Inc. in late 1981 and rejected him. Piedmont sought to depose Fortune on March 5, 1990, 15 days before the trial began; Piedmont asserted the deposition was necessary because Fortune would be unavailable to testify. *See* Fed. R. Evid. 804(a)(5); (b)(1). According to Piedmont, Fortune would have testified regarding his personal impressions of McDonald's temperament and suitability as a pilot. Piedmont argued that the testimony would be relevant to damages and to McDonald's credibility.

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[5] To be entitled to a "first right of hire," a protected employee must meet an air carrier's qualifications requirements for employment. *See* 29 C.F.R. §§ 220.11(a), 220.20(a), and 220.21(a) (1989); *Hulsey v. USAir, Inc.*, 868 F.2d 1423, 1425 n.2 (5th Cir.), *cert. denied*, 110 S.Ct. 239 (1989); *Robinson v. American Airlines, Inc.*, 722 F.Supp. 757, 766 (D.D.C.), *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990); *Crocker v. Piedmont Aviation, Inc.*, 743 F.Supp. 1, 2-3 (D.D.C. 1989), *appeal filed*, No. 90-7021 (D.C. Cir. Feb. 23, 1990), *argued*, January 18, 1991.

At a February 23 pretrial conference, the district court granted McDonald's request to vacate the deposition notice because the discovery deadline had passed and because Fortune's videotape testimony would be excluded at trial as being substantially more prejudicial than probative. *See* Fed. R. Evid. 403. The district court clearly acted within its direction in so ruling.

The district court also acted within its discretion in refusing "for essentially the same reasons" to receive the same type of testimony from Captain Karen Lee, who interviewed McDonald for a pilot position with Orion Air. The district court made this ruling at a conference held on March 5.

Next, we reject Piedmont's argument that the district court erred in excluding portions of McDonald's military and employment records, as well as the testimony of Dr. Robert Helmreich, a psychologist. Piedmont sought to use the military and employment records in its cross-examination of McDonald; it intended to present Helmreich as a defense witness.

The district court properly excluded all of this evidence. As Piedmont had none of this information at the time it refused to hire McDonald, the evidence was irrelevant to Piedmont's liability under Section 43(d). *See Crocker v. Piedmont Aviation, Inc.*, 743 F.Supp. at 3.

Piedmont cannot ignore its statutory obligation to give first consideration to protected pilots. It made no good faith examination of McDonald's application. So far as Piedmont then knew, McDonald was qualified to be employed as a pilot. Under the circumstances, Piedmont may not now be permitted to show what it might have

found, which might have been a reason for finding McDonald not qualified. Consequently, Piedmont is liable for damages under the Airline Deregulation Act.

Third, Piedmont contends that the district court erred in instructing the jury regarding the first right of hire under Section 43(d). Piedmont argues that the instruction was prejudicial because it permitted the jury to find liability before McDonald had met its qualifications for employment, namely the "requirement" that McDonald be qualified as a flight engineer. We disagree.

In its jury instructions, the district court stated that "Captain McDonald must prove that he applied; that his application was complete and in conformity with the rules and practices of Piedmont. . . . " The district court further stated that "[o]nce a pilot meets the qualifications of the occupational speciality set forth in the statute, his right to be employed by Piedmont must be preferred. . . . "

At trial, Piedmont sought to prove that the flight engineering examination, or its equivalent, was a prerequisite to employment as a Piedmont pilot. In contrast, McDonald argued that although Piedmont requested him to obtain flight engineering qualifications, this was not a requirement for employment as a pilot. There was evidence that at least one other Piedmont pilot, who began training in July 1982, was not so qualified.

We believe the jury was properly instructed to determine whether McDonald met Piedmont's requirements and qualifications for employment. As part of this analysis, the jury could determine whether successful completion of the written flight engineering examination was such a requirement, as Piedmont contends.

Piedmont next argues that the district court inadequately instructed the jury regarding McDonald's obligation to mitigate damages. The district court instructed the jury as follows:

> If you find Piedmont violated the statute and the violation was a substantial factor in not hiring [McDonald] and caused [McDonald] damage, you may then consider whether Captain McDonald should have taken any action such as a reasonable person would have taken under the circumstances to avoid or reduce his damages. And if you find he did not, you may reduce his damages accordingly. If you find that Captain McDonald's going to work for Air Berlin satisfied this duty to mitigate, then you should reduce his damages only by the extent of the amount he received or will receive in salaries and benefits from Air Berlin.

This instruction fully apprised the jury of McDonald's duty to mitigate damages, given the lack of evidence that he had failed to do so. *See Selzer v. Fleisher*, 629 F.2d 809, 812 (2d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

Finally, we address Piedmont's challenges to the damage award. At trial, Chief Judge Brieant instructed the jury that damages for a violation of Section 43(d) were intended "to compensate or make Captain McDonald whole insofar as possible. . . . " He further instructed:

> [Y]ou should consider the earnings and benefits the plaintiff would have received in Piedmont if he had been hired and pursued a normal career with that company, minus, less the earnings and

> benefits plaintiff earns at his present position with Air Berlin or could have earned elsewhere in the exercise of due diligence seeking a job as an aircraft crew member.

The jury thereafter found for McDonald and awarded him $2,226,920. This was the amount that McDonald's expert witness, Daniel W. Akins, had computed as McDonald's adjusted lost earnings and benefits for the period beginning in late 1981 or early 1982[6] and ending in April 2004, when McDonald would retire at age 60.

Piedmont argues that the district court erred in permitting the jury to award compensatory damages for the expected duration of McDonald's career. It asserts that Section 43(d) is part of a temporary transitional assistance program under which remedies were provided for a limited period of 72 months. We agree.

Section 43(d) does not specify what damages are recoverable for the denial of a protected employee's first right of hire. Consequently, this court's " 'function is to decide what remedies are appropriate in light of the statutory language and purpose and the traditional modes by which courts compel performance of legal obligations.' " *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 376 (1982) (quoting *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261-62 (1951)

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[6] Based on the amount of the damage award, the jury found that Piedmont could have placed McDonald in its January 4 class of pilots. The jury discredited Piedmont's claim that it had filled the January 4 class before Piedmont had notice of McDonald's protected status and McDonald had proved that he met its employment requirements.

(dissenting opinion)). In reviewing the statutory language, Section 43(d) should be considered in the context of the entire employee protection program of Section 43. *See* N. Singer, *Sutherland Statutory Construction* § 47.01, 47.02 (4th ed. 1984 & Supp. 1990).

Section 43 consists of two interrelated components. The first provides for monthly federal assistance payments while an eligible protected employee is looking for a new position. *See* 49 U.S.C. § 1552. Although this program was not funded and never became operative, *see Alaska Airlines, Inc. v. Brock*, 480 U.S. at 681, assistance payments were to continue until the protected employee obtained "reasonably comparable employment" or had received benefits for 72 months, whichever came first. *See* 49 U.S.C. § 1552(e). The second aspect of Section 43, set forth in subsection (d), created a hiring preference to enable these employees to find reasonably comparable employment. *See id.* "The duty to hire provision was adopted as a supplement for the monthly assistance payments to reduce and [sic] burden on the federal government purse. . . . " *Crocker v. Piedmont Aviation*, No. 86-1673 (RCL) (D.D.C. Feb. 8, 1990), *appeal filed*, No. 90-7021 (D.C. Cir. Feb. 23, 1990), *argued*, January 18, 1991.

Given the language of Section 43 and subsection (d)'s purpose as a supplement to the temporary monthly assistance payments, we agree that damages recoverable under Section 43(d) are limited. We hold that a protected employee can recover damages for the denial of a first right of hire until the employee obtains employment reasonably comparable to that denied, for a maximum of 72 months.

Although the district court did not instruct the jury to determine whether McDonald's employment at Air Berlin was reasonably comparable to that at Piedmont, we find, because of the enormous pay differential and the other obvious differences between working as a pilot for a small German charter company and a large American commercial air carrier, that the jury could not have determined that the employment was reasonably comparable. We conclude that McDonald is entitled to damages for 72 months from January 1982, when he was denied a first right of hire by Piedmont.

We affirm the jury's determination of liability but reverse the award of damages and remand for further proceedings to determine damages. On remand, the district court may, in its discretion, compute damages for 72 months from the evidence given by Daniel W. Akins, McDonald's expert, which the jury credited, and use the remittitur device to order a new trial on damages unless the plaintiff accepts the reduced sum, as calculated for the allowable 72 months.

Affirmed in part; reversed in part and remanded for further proceedings to calculate damages.

## APPENDIX 2

## UNITED STATES COURT OF APPEALS

## FOR THE SECOND CIRCUIT

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**At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of JUNE, one thousand nine hundred and NINETY-ONE**

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|---|---|
| PAUL F. MCDONALD,<br>PLAINTIFF-APPELLEE,<br>V.<br>PIEDMONT AVIATION, INC.<br>DEFENDANT-APPELLANT | DOCKET NUMBER<br>90-7328<br>84CV8262<br>BRIEANT SDNY<br>(Filed<br>Jun. 24, 1991) |

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by PLAINTIFF-APPELLEE MCDONALD

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

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## APPENDIX 3

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL F. MCDONALD,

Plaintiff-Appellee,

-v-

PIEDMONT AVIATION, INC.,

Defendant-Appellant.

Civ. Ap. 90-7328

NOTICE OF MOTION TO EXTEND TIME TO FILE, AND SIZE, OF PETITION TO REHEAR, SUBMIT A DOL AMICUS BRIEF & AN EXPERT AFFIDAVIT.

Stamped FILED by Clerk: April 25, 1991

Motion By:
John G. McDonald
64 Montgomery Street
Rhinebeck, N.Y. 12572
(914) 876-2696, 2699

Opposing Counsel:
Jeffrey I. Kohn
O'Melveny & Myers
153 East 53rd Street
New York, N.Y.
10022-4611
(212) 326-2000

JUDGE OR AGENCY WHOSE ORDER IS BEING APPEALED:

Order dated April 11, 1991 by Judge Lumbard reversing the District Court's Order as to measure of damages.

BRIEF STATEMENT OF THE RELIEF REQUESTED:

Permission to extend time to file, and size, of Petition to Rehear, to submit a Department of Labor Amicus Brief, and an Expert Affidavit.

FROM MCDONALD'S AFFIRMAT'ON IN SUPPORT HEREOF:

In this Motion, McDonald requests permission:

1) To extend the time to file the petition for rehearing to 16 May 1991, and to file more than fifteen pages.

2) To submit to this Court a copy of an Amicus Brief by the Department of Labor dated 29 January 1991, and filed with the D.C. Circuit Court of Appeals in *Crocker v. Piedmont*, supra. The DOL Brief directly contradicts the interpretation of Section 43 rendered in *Crocker* and relied on by this Court.

3) To submit an affidavit by JOHN NANCE, an industry expert on Deregulation and Safety, on the purpose of Section 43 to reinvest experience to maintain the highest standards of safety.

/s/ John G. McDonald, Attorney for Plaintiff-Appellee
Paul F. McDonald Dated: 24 April 1991

————ORDER————

Amended*

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

Stamped FILED by
Elaine B. Goldsmith,
Clerk
May 7, 1991

Dated: 7 May 1991
/s/ Frank X. Altimari

*to the extent that the Petition does not exceed 25 pages.

## APPENDIX 4

**Paul F. McDONALD, Plaintiff,**

**v.**

**PIEDMONT AVIATION, INC.,**

**Defendant.**

**No. 84 Civ. 8262 CLB.**

United States District Court,
S.D. New York.

Jan. 6, 1986.

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John G. McDonald, Rhinebeck, N.Y., for plaintiff.

Charles C. Read, Diane Patrick, O'Melveny & Myers, New York City, for defendant.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

In this action for damages and injunctive relief brought under 28 U.S.C. §§ 1331 and 1332, plaintiff Paul F. McDonald alleges that the defendant Piedmont aviation, Inc. violated § 43 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552, by refusing to give hiring preference to the plaintiff as the statute purportedly would require. Defendant has moved to dismiss or, alternatively, to stay this action pending resolution of an unrelated case pending in the District Court of the District of Columbia, discussed below.

Section 43, entitled "Employee Protection Plan," comprises two related but discrete provisions: the first provides for monthly support payments by the Government to eligible airline workers who had been dislocated by airline deregulation, while the second imposes a duty upon the airline industry to give preferential hiring consideration to those dislocated employees in order to obviate the need for the Government assistance. It is under this second provision that plaintiff claims his private right of action arises.

In pertinent part, this subsection reads as follows:

> "(d)(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational speciality, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person." 49 U.S.C. § 1552(d)(1).

McDonald's claim arises out of Piedmont's decision in 1981 to hire airline personnel, specifically pilots, who allegedly did not qualify as "protected emplyees" to whom preferential hiring treatment was due under § 43. A protected employee, as defined by the statute, is a

person other than a corporate director or officer who had been employed by a certified air carrier for at least four years prior to October 24, 1978. 49 U.S.C. § 1552(h)(1).

In November 1981, following the cessation of Air New England where he had been employed as a pilot for at least seven years, McDonald applied to Piedmont for employment as a pilot. He identified himself as a protected employee. One month later, in December 1981, Piedmont hired a class of pilots consisting entirely of persons who, McDonald alleges, were not protected employees. Finally refused employment in May 1982, McDonald brings this action in an effort to enforce a "first right of hire" contained in § 43 that he contends Piedmont is statutorily obligated to honor.

The defendant moves to dismiss this action on two grounds. Piedmont first argues that § 43 does not create a private right in the plaintiff as a rejected applicant to enforce the statute by injunctive or monetary relief, and that consequently his complaint fails to state a claim upon which relief can be granted. Piedmont also argues that whatever rights § 43 conferred had not ripened at the time McDonald filed his complaint in November 1984 because the Department of Labor regulations intended to implement the statute have not yet been put into effect.

It is clear that this statute contains no express authorization of a private right of action by a person injured by a violation of § 43. Nevertheless, there remains for consideration whether a private remedy should be inferred from the language of the statute and Congressional intent.

Our inquiry begins with analysis of the statutory language itself, *see Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979), applying the criteria set forth in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). If this language fairly implies a right to specific and limited relief in federal court, no additional investigation into Congressional intent would be required. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979) (construing § 215 of the Investment Advisors Act).

In our analysis of the statutory language to ascertain Congressional intent, we must consider three factors: (1) whether the statute was enacted for the especial benefit of the class seeking private enforcement, *see Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 104 S.Ct. 831, 837, 78 L.Ed.2d 645 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 690, 99 S.Ct. 1946, 1954, 60 L.Ed.2d 560 (1979); *Cort v. Ash*, 422 U.S. at 78, 95 S.Ct. at 2087; (2) whether the language relied upon creates a right or imposes a duty, or instead merely proscribes or directs certain conduct, *see Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 771, 101 S.Ct. 1451, 1461, 67 L.Ed.2d 662 (1981); *Touche Ross, supra* 442 U.S. at 569-71, 99 S.Ct. at 2485-86; and (3) whether the statute sets forth adequate mechanisms for enforcement and relief so as to obviate any need for private enforcement, *see Daily Income Fund, supra* 104 S.Ct. at 837; *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13, 101 S.Ct. 2615, 2622, 69 L.Ed.2d 435 (1981).

The first and second factors are usually examined together and are given great weight. As the Supreme

Court observed in *Cannon* when it held that Title IX created a private remedy:

> "With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Cannon, supra,* 441 U.S. at 690, n. 13, 99 S.Ct. at 1954 n. 13 (citations omitted); *see Universities Research Association, supra* 450 U.S. at 773, n. 23, 101 S.Ct. at 1462, n. 23.

By its terms, § 43 establishes a "first right of hire" and identifies the persons upon whom the right is conferred. *See* 49 U.S.C. § 1552(d)(1). Without a remedy there is no right. Under *Cannon,* therefore, a private right of action may fairly be inferred from the statute absent other language that specifies particular, exclusive mechanisms for enforcing those rights. *See Daily Income Fund, supra* 104 S.Ct. at 837; *Middlesex Sewerage Authority, supra* 453 U.S. at 13, 101 S.Ct. at 2622.

Scrutiny of the "Employee Protection Plan," codified at 49 U.S.C. § 1552, reveals no legislative scheme of enforcement that would either refute the implication of the right-giving language quoted above or obviate the need for it by furnishing an alternative remedy that would serve adequately the legislative purpose. *See Daily Income Fund, supra* 104 S.Ct. at 837. Although Congress authorized the Department of Labor to "issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section," 49 U.S.C. § 1552(f)(1), this language cannot be construed to provide

the "express statutory remedies" that the Supreme Court would require in order to deny this plaintiff private enforcement of his conferred right. *See Daily Income Fund, supra* at 837. Where, as here, it is apparent that Congress granted a class of persons certain specific rights and is silent on the question of whether those rights should be enforced by private action, a private remedy may be implied by the courts unless the legislative history shows an explicit purpose to deny such enforcement. *See Cannon*, 441 U.S. at 694, 99 S.Ct. at 1956, quoting *Cort v. Ash*, 422 U.S. 66, 67, 82, 95 S.Ct. 2080, 2082, 2089, 45 L.Ed.2d 26 (1975); *Neilan v. Value Vacations, Inc.*, 603 F.Supp. 1227, 1235 (S.D.N.Y.1985). The legislative history underlying § 43 contains nothing that negates implication of a private right of action. It focuses primarily upon the monthly payment assistance program designed to assist dislocated airline workers in their transition to new employment. *See* S.Rep. No. 631, 95th Cong., 2d Sess. 113-17 (1978). Discussion of the preference hiring requirement was confined to two sentences that reiterated the carrier's duty to hire. *Id.* at 116. Although Congress did not discuss the mechanics of enforcement, its purpose in enacting § 43 is clear, and a private remedy would be necessary to effectuate that purpose. To the extent that a private remedy is "at least helpful to the accomplishment of the statutory purpose," the courts have been decidedly receptive to its implication under the statute. *See Cannon*, 441 U.S. at 703, 99 S.Ct. at 1961 (citations omitted). Accordingly, this Court concludes that the language of § 43 will support a private right of action, and as a result, the complaint does state a claim upon which relief can be granted.

The Court now turns to Piedmont's second contention supporting its motion to dismiss. Piedmont argues that the existence of an enforceable right under § 43 depends entirely on the promulgation by the Department of Labor of rules and regulations designed to implement the program, as contemplated by § 1552(f). It argues that the statute, without more, is inadequate to permit the subject air carriers to satisfy their preferential hiring obligations under the Act and that accordingly it may be inferred that Congress intended to make the private enforcement of statutory rights contingent upon the issuance of elaborative regulations. Although this statute goes back to 1978, there are still *no* regulations. Proposed final regulations implementing § 43 were published in the Federal Register on November 22, 1983, 48 Fed.Reg. 52,854 52,861 (1983), and again on December 27, 1985, 50 Fed.Reg. 53,094, 53,101 (1985) (to be codified at 29 C.F.R. § 220.01, *et seq.*), these have not been put into effect, although whenever bureaucrats are given an opportunity to make rules, they usually do so. Piedmont argues that because there are as yet no rules in effect, McDonald's rights under the statute, if any, have not yet matured.

This argument has no merit. The argument assumes that bureaucrats in the Executive Branch, by their mere inaction in failing to adopt regulations or by involving themselves in an interminable tug-of-war over minutiae to be contained therein, could put off indefinitely (seven years in this case) the effectiveness of a scheme or remedy adopted by Congress that the President did not veto. Such an assumption may not be made lightly. In any event, the adoption of regulations is hardly necessary to the enforcement of § 43 of the Act. As noted earlier, the

statute delineates unambiguously the rights and duties of the parties and identifies specifically to whom they should apply. *See* 49 U.S.C. § 1552(d)(1), (h)(1). The instruction by Congress to the Department of Labor to propose interpretive regulations for the entire Act does not diminish the right-giving force of the statutory language itself; nor could any such regulation dilute or repeal such rights, central as they are to the statutory scheme. Indeed, the rules published in December 1985, but not yet adopted, offer little guidance. *See* 50 Fed.Reg. at 53,101 to 53,105 (to be codified at 29 C.F.R. §§ 220.01-.51). The proposed 1985 regulations are silent as to the mechanism for enforcing the right of hire. They do provide a limited administrative appeal for ascertaining eligibility in the event of a dispute by an employee who "disagrees with the carrier's final determination under § 280.25 that he or she is not a protected employee" 50 Fed.Reg. 53,103-53,104 (to be codified at 29 C.F.R. § 220.-26). Without the regulations, the language of § 43 is sufficiently clear to alert those air carriers who survived deregulation of their responsibilities, without the necessity of further action pursuant to the rule making power of the Department of Labor. The proposed 1985 regulations themselves support this conclusion, by expressly providing that "nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978 and the effective date of these regulations." 50 Fed.Reg. 53,102 [to be codified at 29 C.F.R. § 220.01(g)]. The Department, referring explicitly to this Act, later uses substantially the same language in making the same point. *See id.* at 53,105 [to be codified at 29 C.F.R. § 220.50(c)].

Piedmont relies on other language in the proposed 1983 regulations to support its position, specifically where the Department, in defining scope, announced that "only those employees who are expressly granted a hiring preference under the Act and these regulations have any rights under the Rehire Program." *Id.* at 53,102 [to be codified at 29 C.F.R. § 220.03(a)]. Even if we assume for the argument that the class of eligible protected employees may be smaller if these regulations or similar ones are adopted than it was before, McDonald will still be within the class, and this Court declines to infer from language in regulations not yet adopted that no rights exist at all until adoption. Indeed, the Department's reaffirmation of the employees' statutory rights as recited above forbids such a conclusion.

Accordingly, Piedmont's motion to dismiss this action on this additional ground is denied.

Having concluded that this action is properly before the court, and that the complaint states a claim, we now consider defendant's motion to stay this action pending resolution of *Alaska Airlines Inc., et al. v. Donovan,* 594 F.Supp. 92 (D.C.Dist. Col. 1984).

In exercising its discretion to stay an action before it in favor of a case in another court, a court must be motivated by considerations of judicial economy, fundamental fairness and the orderly administration of justice. Ordinarily, a court would not be justified in holding in abeyance a later-filed action such as this one unless the parties and issues of the concurrent actions are substantially identical. *See Kistler Instrumente A.G. v. PCB*

*Piezotronics*, 419 F.Supp. 120, 123 (W.D.N.Y. 1976). Defendant here contends that the New York and District of Columbia cases are substantially identical in all matters except the parties. Further, it avers that the plaintiff will not be prejudiced by deferring to the District of Columbia action because the issues of concern to McDonald will be adjudicated fully and his interests protected in the other case; moreover, the threat of duplicative litigation will be averted.

The identity of these actions is not particularly significant and would not justify staying this action as defendant requests. Plaintiffs in *Alaska Airlines* allege that the first right of hire provision of § 43 violates due process. While this allegation invites judicial construction of the entire statute, the significant portion of the complaint there is directed against the regulations to be promulgated under the statute. Thus, the *Alaska Airlines* case differs substantially from this action by McDonald, who grounds his claims firmly and solely on the specific language of the statute itself, independent of any interpretative regulations that may or may not ever be promulgated. Since the *Alaska Airlines* action is so closely tied to the regulations and their status, and the regulations are not yet in effect, there is really nothing to litigate at this time.

To submit McDonald's claim to the delays of an action that does not mirror substantially his own is patently unfair.

McDonald's efforts to define and, he hopes, to vindicate his statutory rights should not be held hostage to the trial tactics and delays attendant to another action over which he has no control. Moreover, interests of judicial economy would not necessarily be served by a stay. A

decision and judgment in the District of Columbia action likely would have no claim preclusion or collateral estoppel effect against either party to this action under the rules set forth in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971) and *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330, 331, 99 S.Ct. 645, 651, 652, 58 L.Ed.2d 552 (1979); nor would this district court even be required to reach a consistent result on the due process issue since the rule of *stare decisis* is not implicated. *See Newsweek, Inc. v. U.S. Postal Service*, 663 F.2d 1186, 1196 (2d Cir.1981), *cert. denied sub nom. Council of Public Utility Mailers v. U.S. Postal Service*, 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982); *City Stores Company v. Lerner Shops of District of Columbia*, 410 F.2d 1010, 1014 (D.C.Cir.1969); *EEOC v. Pan American World Airways*, 576 F.Supp. 1530, 1535 (S.D.N.Y.1984).

This Court upholds plaintiff's right to chart the course of his own litigation and to prosecute his claims in the manner of his choice. *See Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). The uncertain risks of inconsistent results or duplicative litigation are not persuasive under the facts presently before this Court. Accordingly, defendant's motion to stay this action pending decision in the District of Columbia action is denied.

Counsel for the parties shall confer with regard to any necessary pre-trial proceedings. A Rule 16 conference will be held February 13, 1986 at 9:00 A.M. in Courtroom 31, United States Courthouse, 101 East Post Road, White Plains, New York 10601.

So Ordered.

## APPENDIX 5

**Paul F. McDONALD, Plaintiff,**

**v.**

**PIEDMONT AVIATION INC.,**
**Defendant.**

**No. 84 Civ. 8262 (CLB).**

United States District Court,
S.D. New York.

Sept. 7, 1988.

Involuntarily terminated airline pilot who applied to another airline for employment filed an action for violation of his rights under the employee protection program of the Airline Deregulation Act. On airline's motion for summary judgment, the District Court, Brieant, Chief Judge, held that appropriate statute of limitations to borrow for private action under employee protection provisions of the Airline Deregulation Act was the most closely analagous state, rather than federal, limitations provision.

Motion denied.

John G. McDonald, Rhinebeck, N.Y., for plaintiff.

Louis B. Kimmelman, O'Melveny & Meyers, New York City, for defendant.

### MEMORANDUM AND ORDER

BRIEANT, Chief Judge.

In this action for money damages and injunctive relief brought pursuant to 28 U.S.C. Secs. 1331 and 1332,

the plaintiff alleges that the defendant violated Sec. 43 of the Airline Deregulation Act of 1978 ("the ADA"), 49 U.S.C.App. Sec. 1552, by refusing to give hiring preference to the plaintiff. This Court previously determined that Sec. 43 supported an implied private right of action. *McDonald v. Piedmont Aviation Inc.*, 625 F.Supp. 762 (S.D. N.Y.1986). Although, this interlocutory order was not amenable to immediate appellate review, or decision was cited with approval on March 27, 1987 by the Supreme Court in *Alaska Airlines v. Brock*, 480 U.S. 768, ___ n.9, 107 S.Ct. 1476, 1482 n. 9, 94 L.Ed.2d 661.

Defendant now moves for summary judgment on the ground that the plaintiff's claim was filed untimely. This motion presents a question of first impression in this Circuit: what is the appropriate statute of limitations to borrow for an action under Sec. 43(d) of the ADA? The motion was fully submitted for decision on July 27, 1988. Thereafter, the Court received, and considered, a letter from defendant's attorneys docketed August 19, 1988.

Through the ADA, Congress sought to deregulate the airline industry and make it more competitive. *Alaska Airlines v. Brock, supra* (citing S.Rep. No. 95-631, p. 52 (1978)). Confident that deregulation would lead to economic benefits for the public, but also aware that it would lead to dislocation of airline employees, Congress enacted the Employee Protection Program ("EPP") in Sec. 43, as part of the ADA. *Id.* The program provides for benefits to "protected employees," defined as employees who had been employed by a certified carrier for at least four years prior to October 24, 1978, Sec. 43(h)(1), and were affected by workforce reductions. The first part of the EPP provides for monthly assistance payments from the

Federal Government to eligible employees who have been dislocated as a result of airline deregulation. Sec. 43(a)-(c), (e).

The second part of the EPP imposes upon the airline industry a "duty to hire" such protected employees. This subsection, Sec. 43(d)(1), provides in relevant part:

> "Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this title prior to October 24, 1978. Each such carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person."

49 U.S.C.App. Sec 1552(d)(1). McDonald bases his claims upon rights granted him as a "protected employee" under this second provision.

In October, 1981 Air New England, Inc. ceased operations, and the plaintiff, who had worked there as a professional commercial airline pilot for at least seven years, was involuntarily terminated. In November, 1981 the plaintiff alleges that he applied to Piedmont for employment, and one month later Piedmont hired a class of employees allegedly consisting entirely of non-protected

employees. The plaintiff requested that Piedmont reconsider his application in light of his protected position under Sec. 43 of the ADA. In a letter dated May 28, 1982, Mr. L.R. Welch, Jr., Director of Personnel Administration for Piedmont, informed Mr. McDonald that his application had been removed from Piedmont's active file and would receive no further consideration. Mr. McDonald filed this action on November 15, 1984, approximately two and a half years after he received notice from Piedmont that his application was no longer being considered.

Defendant now moves for summary judgment on the basis that the claim is time-barred by the relevant statute of limitations.

Congress did not provide a statute of limitations for Sec. 43 or any other provision of the ADA, therefore, this Court must "borrow" the most suitable rule of timeliness from another source. *Agency Holding Corp. v. Malley-Duff & Associates Inc.*, ___ U.S. ___, 107 S.Ct. 2759, 2762, 97 L.Ed.2d 121 (1987).

The Supreme Court in *Agency Holding* outlined the relevant considerations in determining the appropriate statute of limitations. The Court stated that when a federal statute fails to specify a limitations period, the general assumption is that Congress intended by its silence that the court borrow a state statute of limitations. *Id.* This assumption that state law applies is based upon the longstanding practice of the courts, and Congressional awareness of that practice. *Id.*

The Supreme Court noted, however, that in some limited circumstances, state statutes of limitations would

be unsatisfactory vehicles for the enforcement of federal law, and in those circumstances, it would be inappropriate to conclude that Congress would choose to adopt a state law at odds with federal substantive law. *Id.* (quoting *DelCostello v. Teamsters*, 462 U.S. 151, 161, 103 S.Ct. 2281, 2289, 76 L.Ed.2d 476 (1983)). The Supreme Court found that the circumstances under which it is more appropriate to borrow a limitations period found in a federal, rather than state, statute are:

> "[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking . . . "

*Id.*, 107 S.Ct. at 2763 (quoting *DelCostello, supra*, 462 U.S. at 171-172, 103 S.Ct. at 2294). In *Agency Holding* the Court concluded that the circumstances for applying a federal statute of limitations were met, and adopted the limitations period found in the Clayton Act to apply to civil claims under RICO.

Defendant argues that a uniform federal statute of limitations is needed for all Sec. 43(d) claims. The defendant claims that federal labor policy is directly implicated by Sec. 43(d), and therefore, the goals of uniformity and quick resolution of labor disputes require adoption of a relatively short statute of limitations. The defendant also notes that it is a national employer, subject to suit in every jurisdiction in which it flies, and therefore, a federal statute of limitations should be adopted to avoid perceived evils of forum-shopping. The defendant then offers as the closest analogy to a claim of violation of the

first right of hire provision of Sec. 43(d), a claim of unfair labor practice for discriminatory hiring in violation of Sec. 8(a)(3) of the NLRA, to which the six month statute of limitations in Sec. 10(b) of the NLRA, 29 U.S.C. Sec. 160(b), applies. In the alternative, the defendant proposes that a claim under Sec. 43(d) be considered analogous to claims arising under the labor protective provisions of the Interstate Commerce Act, 49 U.S.C. Sec. 11347, and that the two year statute of limitations applicable to actions to enforce rights under the Interstate Commerce Act, 49 U.S.C. Sec. 11706(c)(1), *Modin v. New York Central Co.*, 650 F.2d 829, 833-34 (6th Cir.), *cert. denied*, 454 U.S. 967, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), be applied.

Defendant has called our attention to *Gonzales v. Aloha Airlines, Inc.*, 669 F.Supp. 1023, 1025 (D. Hawaii 1987), in which the District Court borrowed the NLRA six months statute of limitations in a Section 43 case, analogous to the instant case, as well as another Hawaii district court case, *Bigelow v. Hawaiian Airlines, Inc.*, 696 F.Supp. 1356 (1987), which followed the decision in *Gonzales*. Those decisions have, of course, no precedential force in this Circuit. Defendant also directed the Court by letter to a decision in the United States District Court for the District of Columbia, *Crocker v. Piedmont Aviation, Inc.*, 696 F.Supp. 685 (D.D.C.1988), in which the Court held that the three year District of Columbia "catch-all" statute of limitations should be followed for certain claims under Section 43(d). This opinion also lacks precedential force in this Circuit.

After considering the factors outlined by the Supreme Court in *Agency Holding*, this Court concludes that Sec. 43(d) does not require that a federal statute of

limitations be applied, and adopts the most closely analogous New York State limitations period.

While it may be that the federal statutes set forth by the defendant provide a closer analogy to a cause of action under Sec. 43(d) than any state rule, and that the practicalities of litigation against a multistate employer point toward the adoption of a uniform federal statute, those are not the only factors to be considered by this Court. As the Supreme Court explained in *Agency Holding:* "the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations . . . " *Id.*, 107 S.Ct. at 2762. Furthermore, the fact that adoption of a state rule may lead to forum-shopping, which could not occur in this forum for reasons which will be noted below, or to litigation concerning which statute applies, are insufficient, alone or together, for a court to go against the traditional practice of selecting a state statute of limitations. This Court must also consider whether the federal policies at stake make a federal rule significantly more appropriate than a state rule. *Id.* at 2763.

This Court concludes that the federal policies at stake in a Sec. 43(d) claim would not be frustrated by the adoption of a state rule, and do not require the adoption of a federal statute of limitations. The Court finds no reason here to vary from the longstanding practice of adopting a state statute of limitations in the face of Congressional silence. The Employee Protection Program enacted in Sec. 43 of the ADA represents a humanitarian attempt by Congress to ensure that the benefits of deregulation would not be "paid for" solely by airline

employees. *Alaska Airlines, Inc. v. Brock*, 480 U.S. at ___, 107 S.Ct. at 1478. The intent of Congress in passing this legislation is explained in the Committee Report on S. 2493, the Senate bill which contained the protections for employees that became the core of the EPP. H.R.Conf. Rep. No. 95-1779, p. 105 (1978), U.S.Code Cong. & Admin. News 1978, 3737. The report states in relevant part:

> "[A]n individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be ab[l]e to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.
>
> " . . . The Committee believes that the Congress, on behalf of the American people, must insure that the benefits of the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority – the airline employees and their families who have relied on the present system." S.Rep. No. 95-631, p. 114 (1978).

The Senate Committee Report, and the language of the statute itself, make it clear that the primary purpose of Congress in passing the EPP was to protect individual employees from the negative impact of deregulation. Through this provision Congress was attempting to

relieve some of the hardship foreseeably affecting airline employees. Protection of employees is the primary goal of Sec. 43 of the ADA, and that is the key distinction between this case and *DelCostello v. Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) and, *Robinson v. PanAmerican World Airways, Inc.*, 777 F.2d 84 (2d Cir.1985), where courts determined that adoption of a federal statute was appropriate and applied the six month limitations period of Sec. 10(b) of the NLRA to federal causes of action.

The decision in *DelCostello* involved a suit by an employee alleging that an employer had breached a provision of the collective-bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings. 462 U.S. at 163, 103 S.Ct. at 2289-90. The Supreme Court concluded that Sec. 10(b) was the applicable statute of limitations governing the suit, finding that the hybrid Sec. 301/fair representation claim amounted to a direct challenge to the private settlement of disputes under the collective bargaining agreement. *Id.* at 165, 103 S.Ct. at 2291. The Court stated that the federal statute of limitations selected was designed to accommodate the balance of interests present in this type of action, specifically the interest in allowing an aggrieved employee a satisfactory opportunity to vindicate his rights, and the national interest in stable bargaining relationships and finality of private settlements. *Id.* at 171, 103 S.Ct. at 2294.

In *Robinson*, our Court of Appeals applied Sec. 10(b) to a former airline employees' action for termination allegedly due to their pro-union activities. The action was brought under the Railway Labor Act, 45 U.S.C. Sec. 151

*et seq.*, which establishes a scheme for the resolution of labor disputes in the rail and transportation industry. 777 F.2d at 85. The Court defined the two key policy goals behind the RLA as speed, to prevent the disruption caused by prolonged labor disputes in the transportation industry, and uniformity, due to the interstate nature of the employer. *Id.* at 87. The Court stated that the key question in determining whether to apply Sec. 10(b) was whether the dispute necessitated uniform and speedy settlement because it arose out of a labor-management relationship. The Court found that the plaintiff's claim presented such a case since the "discharge of pro-union employees at a time when a union is attempting to organize and represent the employees is the typical labor dispute raising the [relevant] labor-management concerns . . . " *Id.* at 89.

The disputes in *DelCostello* and *Robinson* directly affected the consensual processes that federal labor law is chiefly designed to promote – the formation of a collective bargaining agreement and the private settlement of disputes under it. Thus, significant goals of labor policy would be frustrated through lack of uniformity or failure to resolve the dispute quickly. Under such circumstances, adoption of a federal statute of limitations is appropriate. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966).

In contrast, the Employee Protection Program in Sec. 43(d) does not directly affect industrial peace or the conduct of labor relations under a collective bargaining agreement. It provides remedial benefits through the first right of hire to individuals who lose their jobs due to

action taken by Congress to deregulate the airline industry. While some labor issues may be indirectly implicated, such as seniority rights, the primary policy to be promoted by the legislation, the assistance of dislocated employees, would not be frustrated through the application of a state statute of limitations. Courts should apply the state rule in the absence of Congressional direction to the contrary. Such would be the expectation of Congress.

The defendant argues that the limited duration of the first right of hire provisions of the EPP support a short statute of limitations. The statute defines "protected employees" as those who are separated from employment between October 24, 1978 and October 24, 1988. This Court concludes, however, that this time limit was chosen to define the group eligible for the benefits of the EPP, and is unrelated to the right of any one of them to bring a cause of action to enforce his rights, once established. Furthermore, ten years is a relatively long period to allow for the full effects of deregulation to be felt in the industry.

The Court must now consider which state rule to apply to this lawsuit. Since Mr. McDonald is a Massachusetts resident (Complaint, Para. 4, 5), and his claim accrued there, this Court, under Sec. 202, N.Y.Civ.Prac.L. & R., must borrow a statute of limitations from the laws of Massachusetts because New York would do so to avoid forum shopping. The Court concludes that the three year statute of limitations found in Mass.Gen. Laws Ann. Ch. 260, Sec. 2A for actions of tort applies to this case. The defendant allegedly violated its affirmative duty to plaintiff under Sec. 43(d) to give him preferential hiring treatment, causing economic injury to the plaintiff, and

perhaps entitling him to injunctive relief. While the court notes that an action in tort and an action under Sec. 43(d) are not identical, the lack of a perfect analogy alone is not grounds to discard a state rule. *Agency Holding*, 107 S.Ct. at 2762.

Based upon the foregoing, the Court concludes that the plaintiff's action was timely filed, and, therefore, denies the defendant's motion for summary judgment on the ground of the statute of limitations.

Counsel for the parties shall attend a final pretrial and status report conference before me on October 12, 1988 at 9:00 a.m. in Courtroom 31, United States Courthouse, 101 East Post Road, White Plains, New York, at which time an early trial date will be established by the Court. Please submit a statement of issues to be tried, separately numbered, together with voir dire requests and requests to charge.

So Ordered.

**APPENDIX 6**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| PAUL F. MCDONALD, | : | |
| Plaintiff, | : | 84 Civ. 8262 (CLB) |
| -against- | : | MEMORANDUM |
| PIEDMONT AVIATION, INC., | : | AND ORDER |
| Defendant. | : | |

Brieant, Chief Judge

Plaintiff moves for partial summary judgment on liability pursuant to Fed.R.Civ.P. 56, supported by the affidavits of Capt. Paul F. McDonald, Bruce H. Weiland, and John G. McDonald. Familiarity of the reader with all prior proceedings is assumed. In support of his motion, plaintiff asserts that Piedmont was obligated by § 43(d) of the Airline Deregulation Act of 1978 to honor the hiring preference imposed by the Act for October 24, 1978 through October 24, 1988, and to hire Capt. McDonald when he applied for employment as a pilot with Piedmont in November 1981. This motion was fully submitted for decision on February 21, 1989, and is resolved as follows.

In October 1981, Air New England (ANE) ceased operations, and the plaintiff, who had worked there as a professional commercial pilot for at least seven years, was terminated. In November 1981, the plaintiff applied to Piedmont for employment as a pilot, and one month

later Piedmont allegedly hired a class of employees consisting entirely of non-protected employees.

Capt. McDonald asserts in support of his motion that Piedmont passed over his application in favor of non-protected pilot applicants. Piedmont disputes Capt. McDonald's factual assertion that it hired non-protected employees at a time when McDonald was qualified for employment. Piedmont states that it has been hiring its new pilots exclusively from the ranks of "protected employees" as defined in § 43 of the ADA since July 1982, and that there is still extensive competition for positions due to the size of the "protected employee" applicant pool.

Plaintiff contends that he should have been the next pilot hired by defendant Piedmont after November 1981, when he submitted his application for employment. However, defendant argues that it had no obligation to accord him special treatment under the first right of hire provision of § 43, if at all, until February 1, 1982. It appears that plaintiff did not formally notify Piedmont of his protected status until February 1, 1982, when he met with Capt. Womack, Piedmont's Director of Flight Operations, at Piedmont in Winston-Salem, North Carolina, and requested that Piedmont consider his application in light of his protected position under § 43. Plaintiff believes that the defendant's employees and officers knew when he applied that he was a protected employee under § 43 of the Airline Deregulation Act and were aware of their obligations under the Act, and that he was under no obligation to formally notify Piedmont of the law or his status under it.

Defendant further states that, at the time that Capt. McDonald applied for employment, he failed to satisfy Piedmont's minimum qualifications and requirements for consideration for employment because he had not completed the flight engineer's written exam and did not have a flight engineer's rating. This requirement was not fulfilled by plaintiff until January 4, 1982, and therefore Piedmont claims that any duty to hire plaintiff could not have arisen before that date at the earliest.

Piedmont asserts that, after February 1, 1982, when Capt. McDonald satisfied Piedmont's minimum requirements and Piedmont was notified of Capt. McDonald's protected status, the next class to be hired was selected on or about May 11, 1982. By that time, however, Piedmont states that Capt. McDonald had disqualified himself from employment as a result of his alleged conduct during an incident occurring on April 30, 1982.

In a letter dated May 28, 1982, Mr. L.R. Welch, Jr., Director of Personnel Administration for Piedmont, informed Capt. McDonald that his application had been removed from Piedmont's active file and would receive no further consideration due to his behavior during an April 30, 1982 visit to Capt. Womack's office. Piedmont asserts that, during the April 30 visit, plaintiff harassed Capt. Womack's secretary, Janet Cook, in an effort to gain access to Capt. Womack's office to discuss his employment application. Plaintiff denies that any incident occurred, and argues that, in any event, it is irrelevant because defendant was obligated to hire plaintiff in November 1981. Plaintiff also alleges that his application was rejected because Piedmont has a company policy imposing a cut-off age of 33 for hiring of pilots.

Thus, at the very least, there is a disputed issue of material fact as to what Capt. McDonald said and did at Piedmont's Training Center on April 30, 1982, and whether such conduct arose before or after the claim sued on here arose.

In order for plaintiff to be entitled to a "first right of hire" under § 43(d) and therefore to summary judgment, he would have to establish each of the following elements by a preponderance of the evidence:

> (1) plaintiff must be a 'protected employee' of an air carrier subject to Civil Aeronautics Board regulation, 49 U.S.C. § 1552(d); (2) he must have been furloughed or terminated, other than for cause, by such air carrier during the ten-year period beginning October 24, 1978; and (3) Piedmont must hold a certificate under 49 U.S.C. § 1371 issued prior to October 24, 1978 and must be 'hiring additional employees.' 49 U.S.C. § 1552(d).

All of these elements have been shown by plaintiff and admitted by Piedmont. Piedmont asserts, however, that these facts, alone, do not give plaintiff an unqualified right to be hired. Piedmont contends that, before the right matures and any duty to hire arises, an applicant must show that (1) all of Piedmont's requirements and qualifications for employment as a pilot have been fulfilled, and (ii) Piedmont has been given notice of the applicant's protected status under the statute.

Plaintiff's summary judgment motion is denied on the ground that there are disputed issues of fact as to when defendant Piedmont knew of plaintiff's protected

status, whether plaintiff had fulfilled Piedmont's minimum requirements for consideration for employment, and whether Piedmont had cause not to hire Capt. McDonald because of the April 30, 1982 incident despite his protected status. All of these issues must be tried to a jury.

SO ORDERED.

Dated: White Plains, New York
April 27, 1989

Charles L. Brieant
Charles L. Brieant
Chief Judge

## APPENDIX 7

JURY INSTRUCTIONS RE MEASURE OF DAMAGES in *McDonald v. Piedmont Aviation, Inc.*, in the United States District Court for the So. District of New York, (No. 84 Civ. 8262 CLB).

[p. 709] Now, if you find that Captain McDonald is entitled to recover on his claim for the defendant's breach of a statutory duty to employ him, then you may consider awarding the plaintiff, Captain McDonald, damages in money. If you do not find liability, that is to say if you do not find that Piedmont's violation of Section 43 D was the reason or a substantial factor in the reason for the failure to hire the plaintiff, then there is no need to consider the damages and you simply report a verdict in favor of the defendant.

[p. 710] Now, the fact that I am discussing damages with you in connection with this matter is not to be taken by you as any indication that damages should or should not be awarded, that's for you to decide. As I told you earlier, that decision is yours and yours alone. If you find the defendant liable to Captain McDonald for a statutory violation, and you find that he has been damaged by the failure to hire him as a protected pilot, you will award the plaintiff such amount in money as in the exercise of good judgment and common sense you find is fair and just compensation for the actual fair losses sustained by the plaintiff. In fixing the amount you should consider the earnings and benefits the plaintiff would have received in Piedmont if he had been hired and pursued a normal career with that company, minus, less the earnings and benefits plaintiff earns at his present position with Air

Berlin or could have earned elsewhere in the exercise of due diligence seeking a job as an aircraft crew member. In computing a damage award you must base your computations on your fair and reasonable evaluation of all the evidence. You may not engage in any speculation or guesswork. You can consider evidence of hours actually worked, maximum and minimum salaries, nonsalary benefits, including unemployment and other insurance, such as sick pay, disability pay, pensions and the like. All those things may be considered by you in [p. 711] arriving at a figure. In computing damages you need not limit yourself to statistics; and the evidence of so-called statisticians or other expert witnesses are never binding or controlling on the jury. You simply consider it for such weight and significance and value that you think it has. In making a damage award, you should also consider the possibility that the plaintiff, if he had been hired by Piedmont, might not finish the training school; that he might not live to the expected age or retired; or that he might have a loss of health so he would not have a certificate to fly; or some other occurrence might happen wherein he would not continue to be a full-time employee of Piedmont for the entire period estimated in the Akins report; and you can consider all the other facts in the case and use your best judgment considering all the evidence in the case in computing a damage award that will be fair to both sides.

Damages of the type that I have been discussing with you are compensatory; that is to say, they are intended to compensate or make Captain McDonald whole insofar as possible and place him in the economic position he would

have been in if the statute had not been violated, assuming you find there was such a violation and if the violation had not caused damage. Damages of this type are not given to punish anybody or for any other purpose beyond fair and just [p. 712] compensation for statutory violation.

The losses considered are economic losses only and there is to be no award for emotional distress or annoyance or provocation or anything like that. This is purely a lost wages and lost benefits situation for your consideration. If you find that the salaries and benefits he would have earned at Piedmont would be received over a period of future time, you should discount any damage award to give due regard for the discounted value of money paid now for something to become due in the future, because any verdict for damages in this case will be paid upon the entry of judgment. Although you will understand that future salary won't be received for many years to come, you can use your own knowledge of the interest rates, and you may consider the rate of inflation in the country as affecting value now of payments in the future.

This matter, like all matters concerning damages, is something for you to exercise your common sense. And as I said earlier, we're talking about compensatory damages intended to make him whole in the matter, not for the purpose of conferring a benefit or punishing anybody.

There is one other matter that has to be mentioned whenever compensatory damages are being claimed; that's this, any person who is damaged has a duty to mitigate or reduce his or her damages by taking such [p. 713] reasonable actions as an ordinary, reasonable person

such as any of you would take under the circumstances. For example, if someone has claimed damages for lost wages due to a back injury on the job, and the doctor advises surgery of a reasonable sort which a reasonable person would undergo, then a plaintiff can't refuse the surgery and thereby fail to reduce his damages by putting himself in a position where he can go back to work. It's the same way in a first right of hire case. If you find Piedmont violated the statute and the violation was a substantial factor in not hiring the Plaintiff and caused the plaintiff damage, you may then consider whether Captain McDonald should have taken any action such as a reasonable person would have taken under the circumstances to avoid or reduce his damages. And if you find he did not, you may reduce the damages accordingly. If you find that Captain McDonald's going to work for Air Berlin satisfied this duty to mitigate, then you should reduce his damages only by the extent of the amount he received or will receive in salaries and benefits from Air Berlin.

**APPENDIX 8**

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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HOBART N. CROCKER, JR.,

Appellant,

-v-

PIEDMONT AVIATION, INC.,

Appellee.

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No. 90-7021

D.C. No. 86-01673

Argued January 18, 1991

Decided
May 24, 1991

Pierre Murphy, with whom Robert M. Beckman and David M. Kirstein were on the brief, Washington, D.C., for appellant.

Richard G. Parker, with whom Donald T. Bliss and James J.R. Talbot were on the brief, Washington, D.C., for appellee.

Elizabeth Hopkins, Allen H. Feldman and Steven J. Mandel, Attys., Dept. of Labor, entered appearances. Washington, D.C., for amicus curiae urging reversal.

Before MIKVA, Chief Judge, and SENTELLE and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

HENDERSON, Circuit Judge:

Hobart N. Crocker, Jr., brought this action alleging that Piedmont Aviation, Inc. violated section 43(d) of the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978), by failing to accord Crocker a hiring preference after he lost his position as a pilot with a regulated, certificated airline following deregulation of the airline industry. The district court granted summary judgment in Piedmont's favor, concluding that Crocker lost his section 43(d) right of first hire before the alleged violation when he obtained employment with a noncertificated commuter airline. 741 F.Supp. 241. Crocker now appeals the district court's judgment asserting that his first-hire right survived his hiring by the noncertificated carrier. We agree with Crocker that employment by a noncertificated carrier does not extinguish a section 43(d) first-hire right and, therefore, reverse the district court.

I.

On Appeal from a grant of summary judgment, we must view the record in the light most favorable to the appellant. *Williams v. Mordkofsky*, 901 F.2d 158, 160 (D.C.Cir.1990). So viewed, the record reveals the following facts.

In 1971 Crocker began employment as an airline pilot for Air New England, a regulated airline holding a certificate of public convenience and necessity from the Department of Transportation. In 1978, while Crocker was so employed, Congress passed the ADA which largely freed the airlines from government regulation. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 680, 107 S.Ct. 1476, 1477,

94 L.Ed.2d 661 (1987). Seeking "to ensure that the benefits to the public flowing from this deregulation would not be 'paid for' by airline employees who had relied on the heavily regulated nature of the industry in deciding to accept and to retain positions with commercial air carriers," Congress enacted section 43 of the ADA, the "Employee Protection Program," 49 U.S.C. app. § 1552, (EPP), "in order to assist employees dislocated as a result of deregulation." *Alaska Airlines*, 480 U.S. at 680-81, 107 S.Ct. at 1478.

The EPP, as enacted, provides two benefits for a displaced airline employee who qualifies as a "protected employee," that is, an employee who "on October 24, 1978, ha[d] been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of [the appendix to title 49]." 49 U.S.C. app. § 1552(h)(1). First, the EP provides for payment from a government fund of a "monthly assistance payment" to a protected employee who loses his job or suffers financial loss as a result of a bankruptcy or severe work force reduction caused by deregulation. *See* 49 U.S.C. app. § 1552(a), (b), (h); *Alaska Airlines*, 480 U.S. at 681 & n. 1, 107 S.Ct. at 1478 & n. 1.[1] Second, subsection (d) of the EPP guarantees a right of first hire under certain circumstances for a displaced protected employee:

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[1] Because Congress made those payments "subject to such amounts as are provided in appropriation Acts," 49 U.S.C. app. § 1552(a)(1), and because no money was ever appropriated for them, the financial assistance provisions have never been implemented. *See Alaska Airlines*, 480 U.S. at 681, 107 S.Ct. at 1478.

> Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the ten year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of [the appendix to title 49] prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they [sic] hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

49 U.S.C. app. § 1552(d).

In October 1981 Crocker was furloughed by Air New England when that airline ceased operation. In April 1982 he applied for employment with Piedmont, a "certificated" carrier subject to the EPP's first-hire duty, and in July of that year Piedmont interviewed him. In December 1982, having heard nothing from Piedmont, Crocker took a position as chief pilot for Coral Air, Inc., a noncertificated commuter airline then in Chapter 11 bankruptcy, and soon afterward became its Director of Operations. In July 1983, shortly before Coral Air's assets were frozen

and it halted operations, Crocker resigned his position with that carrier.

In June 1986, Crocker filed this action alleging Piedmont violated section 43(d) by refusing to hire him, pursuant to his right of first hire, during the period beginning in March 1984 when Piedmont hired other, nonprotected pilots.[2] On October 4, 1989, Piedmont moved to strike certain portions of Crocker's claim for relief. By memorandum opinion and order filed November 15, 1989, the district court, treating the motion as one for summary judgment, granted judgment in Piedmont's favor on the ground that Crocker ceased to be a covered employee entitled to a hiring preference when he took employment with Coral Air. Crocker then filed a motion for reconsideration which was denied by memorandum opinion and order filed February 8, 1990. Crocker now appeals the district court's decision.

II.

It is undisputed for the purpose of this appeal that Crocker is a protected employee under the EPP and that he acquired a section 43(d) right of first hire in October 1981 when he was laid off by Air New England. Thus, the sole issue before this court is whether Coral Air's hiring of Crocker in December 1982 extinguished his right of first hire under the statute so as to relieve Piedmont of its

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[2] While this action was pending, Crocker obtained, and resigned from, employment with two other non-certificated airlines. He worked for Eastern Metro Express from July 1986 until November 1986 and for Eastern Express from January 1987 until March 1987.

statutory obligation to afford Crocker a hiring preference over nonprotected applicants. We hold that it did not.

In its opinion granting Piedmont's motion, the district court concluded that Crocker's employment with Coral Air, a noncertificated carrier, extinguished his first-hire right. Observing that the EPP expressly limits the duration and amount of monthly assistance payments to a displaced protected employee able to obtain new employment by (1) reducing the amount of monthly payments to a protected employee who is offered but fails to accept "reasonable comparable employment," 49 U.S.C. app. § 1552(b)(2), and (2) terminating payments altogether after seventy-two months or when "the recipient obtains other employment," whichever occurs first, 49 U.S.C. app. § 1552(e)(1), the district court reasoned:

> The fact that an employee was hired by a non-covered carrier, if in a "reasonably comparable position," would get the employee off the assistance to the extent that the salary was comparable. It would be a strange result for the government to burden private employers more than itself by letting the government's responsibility end when the protected employees got "reasonably comparable employment" but require continued private air carrier preference until the employee got a "covered carrier" position.

Memorandum Opinion dated November 14, 1989 at 7-8 (footnote omitted). In its order denying reconsideration, the court offered an additional rationale for its ruling: "Plainitff secured a job in his occupational speciality, albeit without the help of the ADA. He was then no longer 'furloughed' or 'terminated' and therefore he is

ineligible for the first-hire preference under the terms of the statute, the legislative intent, and the agency interpretation." Memorandum Opinion and Order dated February 8, 1990. We reject the district court's analysis for the following reasons.

First, the EPP itself imposes no limits on the length of a protected employee's first-hire right and we do not believe the statutory restrictions on financial assistance should be engrafted on the first-hire provisions[3]. In restricting the assistance payments, Congress acted to "limit[] as much as possible the potential expenditure of Government funds," S.Rep. No. 95-631, 95th Cong. 2d Sess. 115 (1978), and to ensure that it created no disincentive to reemployment, *see id.* at 117 ("The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax income in order to preserve maximum incentives for employees to secure comparable work."), *quoted in Alaska Airlines*, 480 U.S. at 694, 107 S.Ct. at 1485. These concerns do not support similarly limiting a pilot's first-hire right. The first-hire provisions impose no additional expense on the government and in fact were viewed by Congress as a means of relieving the financial burden created by the monthly assistance payments. *See* S.Rep. No. 95-631, 95th Cong.2d Sess. 116 (1978) ("The interactions of these provisions will decrease the cash payments required under the program."); 124 Cong.Rec. 10,765

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[3] In fact, given the express statutory restrictions on the financial assistance benefits, the absence of any similar limitations on the first-hire right suggests that Congress intended to impose none.

(1978) (Senator Zorinsky, seeking to amend the bill to provide a hiring preference only "instead of affording the relief of compensation from the pockets of the Nation's taxpayers"). Further, the prospect of losing those rights upon employment by a noncertificated airline might discourage a displaced employee from seeking interim employment such as that taken by Crocker and prompt him instead to wait for an opportunity to use the first-hire right to obtain employment with an established, formerly certificated airline. That result would frustrate the legislative intent to encourage reemployment of displaced protected employees and actually increase the number of monthly payments, thereby exacerbating the drain on the public fisc. For these reasons we reject the district court's conclusion that the financial assistance restrictions should be applied to the first-hire right.[4]

Second, we do not agree with the district court's conclusion that a protected employee ceases to be "furloughed or otherwise terminated," so as to qualify for the hiring preference, when he is hired by a noncertificated airline. This rationale assumes that when the statute speaks of an employee being "furloughed or otherwise terminated," it is referring to a status that an employee acquires when terminated and later loses if hired by any other employer. We think that under the more natural

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[4] In declining to apply those restrictions to the first-hire provisions, we may be at variance with the Second Circuit's recent decision in *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir.1991), which relied on the financial assistance restrictions to limit to seventy-two months the amount of back pay recoverable by a protected employee who is denied his first-hire right. *Id.* at 226-227.

reading of the statutory language the contemplated termination or furlough should be viewed as a single act of the employing carrier which triggers the first-hire right.

Third, we find the district court's holding contrary to the recently expressed position of the Department of Labor (Department), the agency charged with promulgating regulations under section 43. When the district court issued its decision, the Department had not espoused a clear opinion on the question presented.[5] Since that time, however, the Department has interpreted section 43(d) to mean that a displaced protected employee retains his first-hire right until hired by an air carrier that held a certificate before deregulation and that the employee, therefore, does not lose that right upon employment by a noncertificated carrier such as Coral Air. *See* Brief for the Acting Secretary of Labor as Amicus Curiae; Department's Letter to United Airlines, dated January 3, 1991. Because Congress expressly charged the Department with administering the EPP, its interpretation is entitled to deference unless inconsistent with the statutory language. *See Robinson v. American Airlines, Inc.*, 908 F.2d

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[5] The district court did have before it, and relied upon, an opinion letter by the Department stating that a protected employee lost his first hire right upon reemployment *by a certificated air carrier. See* Department's Letter to USAir, Inc., dated June 2, 1989. The broad language used in that letter, viewed in isolation, can be construed to support Piedmont's position here. *See id.* at 1 ("A designated employee who has obtained another job in his or her occupational [sic] no longer has any rehire rights. Once a designated employee obtains another job, that employee would no longer be furloughed or terminated.").

1020, 1023 (D.C.Cir. 1990). We find the Department's interpretation consistent with both the language and intent of the statute.

As noted above, the first-hire right, unlike the financial assistance entitlement, is not expressly limited by the statutory language. Further, the benefit expressly provided under subsection 43(d) is the right of a long-term "protected" employee of a certificated carrier to first hire *by another certificated carrier*, at the least suggesting, as the Department maintains, that Congress intended to ensure that a displaced protected employee obtain employment not merely with *any* air line but with one comparable to his previous employer, namely an established carrier that held a certificate before regulation, and that the first-hire right therefore survive until the employee obtains such employment.

Nevertheless, Piedmont, responding to the Department's position, now offers in its post-argument brief a new interpretation of section 43(d) to support its position that Crocker lost his first-hire right when Coral Air hired him. Piedmont first points out that the statute uses different language to describe a carrier that triggers an employee's first-hire right by terminating him and a carrier that is subject to the first-hire duty: the former being one "which is subject to regulation by the Civil Aeronautics Board" and the latter being one "which held a certificate issued under section 1371 of [the appendix to title 49] prior to October 24, 1978." Piedmont next reasons that this difference was purposeful and that Congress intended thereby that a protected employee should acquire the first-hire right when terminated by *any carrier subject to regulation by the Civil Aeronautics Board* (CAB),

whether or not formerly certificated or otherwise regulated. Piedmont further asserts that this intent would be unnecessary unless Congress contemplated that a protected employee also lose his first-hire right upon hiring by any carrier subject to CAB regulation, whether or not certificated. Otherwise, Piedmont contends, there would be no need to confer the right upon termination by the regulated but noncertificated carrier because the employee would already possess the right, having acquired it when terminated by the certificated carrier by which he was employed on October 24, 1978. We find Piedmont's latest argument unpersuasive for the following reasons.

First, Piedmont's construction seems inconsistent with Congress's intent that the EPP benefit long-term employees of certificated carriers who relied on the security of their employment with those carriers and who lost that employment as a result of deregulation, *see Alaska Airlines*, 480 U.S. at 680-81, 107 S.Ct. at 1477-78; *cf.* 49 U.S.C. app. § 1552(a), (h)(2) (permitting monthly financial assistance payments only to individuals adversely affected by "a bankruptcy or major contraction of an air carrier holding a certificate"), because it would confer the right of first hire on a protected employee when terminated by *any* carrier, whether or not the employee has been involuntarily terminated by the certificated carrier by which he was employed on October 24, 1978. Thus, under Piedmont's interpretation, a protected employee who resigned employment with his long-term, certificated employer, or was discharged for cause, would acquire the first-hire right if terminated or furloughed by a subsequent, noncertificated employer.

Second, had Congress intended that the right of first hire be lost upon hiring by any carrier subject to regulation, it could easily and clearly have expressed that intent in the statutory language. There was no need or reason for Congress instead to have left so significant a provision to be inferred through the subtle and complex logic now offered by Piedmont, and we do not believe it did so.

The apparently inconsistent descriptions of the two classes of carriers can more simply and fairly be ascribed to imprecision of language than to any conscious intent to distinguish between them. In referring to carriers "subject to regulation by the Civil Aeronautics Board," Congress may well have meant only those carriers formerly holding a certificate, which were, after all, the only carriers subjected to actual regulation by the CAB.[6] Such a meaning is supported by the preceding phrase "protected employee of an air carrier" which at the least suggests that the employee is protected by virtue of his employment with the subject carrier; that being the case, the terminating carrier would, given the statutory definition of "protected employee," of necessity be one which held a certificate of convenience and necessity on October 24, 1978. That meaning is also the one adopted by the

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[6] The Senate report on the EPP similarly refers to a certificated carrier as a "regulated carrier." S. Rep. No. 95-631, 95th Cong. 2d Sess. at 116-("each regulated carrier is required to give priority hiring to displaced employees who satisfy the eligibility requirement").

Department in its regulations. *See* 29 C.F.R. § 220.10, 220.01(e) (granting first-hire right to "a protected employee who is voluntarily placed on furlough or is terminated by a covered air carrier" and defining "covered air carrier" as "an air carrier which was certificated prior to October 24, 1978").

For the preceding reasons, we conclude that Piedmont's construction of section 43(d), while perhaps permissible, is not the only or even the more plausible interpretation, given the circuitous route required to reach it and the purpose of the EPP. Moreover, because the Department's construction is a reasonable one consistent with the EPP's language and purpose, we are required to adopt that interpretation and to hold that Crocker did not lost his statutory first-hire right when he was hired by Coral Air. Accordingly, the judgment of the district court is

*Reversed and Remanded.*

## APPENDIX 9

The Airline Deregulation Act of 1978.
Pub. Law 95-504 (S.2493); October 24, 1978. Section 102(a)(1) and (2) and Section 43 (49 USC §§ 1302(a)(1) & (2) and Section 1552)

**49 USC § 1302**

### § 1302 Consideration of matters in public interest by Board

**(a)** Factors for interstate, overseas, and foreign air transportation. In the exercise and performance of its powers and duties under this Act, the board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 107 of this Act [49 USCS Appx § 1307].

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

**§ 1552. Employee protection program**

**(a) General Rule.** (1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

**(b) Monthly assistance computation.** (1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. In computing

such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If any eligible protected employee is offered reasonably comparable employment and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have beeen [been] entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining pursuant to the maximum provided in subsection (e).

**(c) Assistance for relocation**. If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

**(d) Duty to hire protected employees.** (1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on the date of enactment of this section [enacted Oct. 24, 1978] shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 401 of the Federal Aviation Act of 1958 [49 USCS Appx. § 1371] prior to such date of enactment. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 401 of the Federal Aviation Act of 1958 [49 USCS Appx. § 1371]. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employee in finding other employment. Any

individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfull [sic] his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

**(e) Period of monthly assistance payments.** (1) Monthly assistance payments computed under subsection (b) for a protected employee who has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 72 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months; so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

**(f) Rules and regulations.** (1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after the date of enactment of this section [enacted Oct. 24, 1978].

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

**(g) Airline employees protective account**. All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal

year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section.

**(h) Definitions**. For the purposes of this section –

(1) The term "protected employee" means a person who, on the date of enactment of this section [enacted Oct. 24, 1978], has been employed for at least 4 years by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act of 1958 [49 USCS Appx. § 1371]. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 401 of the Federal Aviation Act of 1958 [49 USCS Appx. § 1371], occurring during the first 10 complete calendar years occurring after the date of enactment of the Airline Deregulation Act of 1978 [enacted Oct. 24, 1978], the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent maybe found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in

which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½ percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

**(i) Transfer of authority of Board**. The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

**(j) Termination**. The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section. (Oct. 24, 1978, P.L. 95-504 § 43, 92 Stat. 1750.)

## APPENDIX 10

AFFIDAVIT OF JOHN J. NANCE, submitted with McDonald's Petition to Rehear, in *McDonald v. Piedmont Aviation, Inc.*, (Civ. Ap. 90-7328) to the Court of Appeals for the Second Circuit.

### AFFIDAVIT

### SUBMITTED BY PERMISSION OF THE COURT BY ORDER OF JUDGE ALTIMARI OF 7 MAY 1991,

State of Washington §
§
County of Pierce §

The undersigned JOHN J. NANCE, being duly sworn, and under the penalties of perjury, hereby attests to the following.

In passing the Airline Deregulation Act of 1978, the Congress clearly and unequivocally stated their firm intention that the safety of airline transportation not be lessened or compromised as a result of the pivotal changes and free market forces the Act was expected to unleash on the airline industry.[1] Indeed, the first two paragraphs of Section 102 clearly established this legislative intention when it directed that in the exercise and performance of its powers, the Civil Aeronautics Board "shall consider the following, among other things, as being in the public interest . . . ":

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[1] The Short Title of the Act was "The Airline Deregulation Act of 1978", Pub.Law 95-504 [S.2493]; October 24, 1978.

"(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report of recommendation submitted under section 107 of this Act,

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public,"[2]

While the primary agent of safety assurance for the air transportation system of the United States was to remain the Federal Aviation Administration and the body of regulations known as the F.A.R.'s (Federal Air Regulations), additional safeguards were considered and adopted following the two years of legislative hearings and committee reports, one of the most significant of which, the Labor Protective Provisions of § 43 of the Act, sought to address the potential massive disruption in the professional lives of the pilots and other highly-trained technical people who had "relied on the heavily regulated nature of the industry in deciding to accept and to retain positions with commercial air carriers."[3] While these

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[2] P.L.95-504, Sec. 102 (a), (1) and (2).

[3] ALASKA AIRLINES, INC. v. BROCK, 480 US 678, 94 L Ed 2d 661, 107 S CT. 1476, pp 667, 1.

provisions were included in the draft and markup stage in part to assuage the deep concerns of the various employee unions over the ultimate fate of their employees if the predicted rash of airline bankruptcies and downsizing did occur in a future environment of full deregulation, there was an equal emphasis on and concern over the potential loss of seasoned, experienced professionals in the airline industry, a worry expressed in many of the hearings and industry discussions incident to the adoption of the LPP "package". While there is no doubt that one portion of the LPP's addressed merely potential bridging compensation to displaced pilots (and other technical/operational workers), they contained another pivotal provision drafted specifically to address the worrisome potential that men and women who had spent years developing finely-tuned skills and carefully-honed abilities is such critical human performance areas as judgment and decisional maturity would be flushed *en masse* from the system at the very moment when an expected influx of less experienced people would be needed to fill the ranks of the expected influx of new airlines large and small. In fact, the Congress specifically illustrated its worry over the experience levels of pilots and other technical professionals when it created the so-called "protected employee" class under the LPP provisions. Instead of covering all airline employees employed on the date of the Act, it instead included only those employees who had amassed at least 4 years of experience. There could be no valid reason for such an exclusion of lesser-experienced employees (especially in the face of deep labor union concerns which encompassed *all*

employees employed over one year, the traditional probationary period) had not the Congress fully accepted the incalculable value of experience, and the value in the minds of the traveling public of experience, especially with regard to pilots.[4]

In fact, the linkage of flight crew experience to flight safety is well-established, and Congress' understanding of this was expressed clearly by the direct linking of its stated dedication to the preservation of safety with the mechanism to encourage retention of seasoned (minimum four years) employees. The chosen instrument of Congress to effect this protection was an unprecedented and legally superior First Right of Hire, an extraordinary creation which would enable a pilot (whose carrier had collapsed or severely contracted and who had thus been left unemployed) to take the first place in line (second only to an existing airline's furloughed pilots) for rehiring into another carrier of similar size and scope which could properly utilize his skills in the public interest. Indeed, it was well-established by the testimony of such men as Professor Alfred Kahn of Cornell, then the Chairman of the Civil Aeronautics Board, that the Act was expected to *increase*, not decrease, the number of available pilot jobs as the industry changed in character and composition. There were to be, in other words, plenty of new pilot positions with newly formed airlines to utilize those

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[4] In fact, the LPP's specifically required the protected employee to cooperate in attempting to recycle his career skills by reentering the industry as soon as possible through the use of First Right of Hire protection by *excluding* such employee if he or she failed to cooperate and reapply.

seasoned pilots, but in many cases, it would not be the original carrier in which a given pilot had begun and nurtured his career and his skills. The recycled pilot would be severely damaged in terms of permanent loss of seniority and pay status with his old carrier, but at least he would be able to pursue his profession, and the country would be able to retain the security of his experience. It was this experience that the Congress was striving to retain in order to better preserve airline safety during an expected period of dynamic and disruptive change.

## The Role Of Experience In Flight Safety

Some aspects of Airline Deregulation's negative effects on safety have been debated hotly during the past five years, specifically the issue of whether statistical proof could be developed to support the widespread and oft-repeated contention that the cost-pressures on airlines spawned by unregulated competition have reduced the margins of safety in the airline industry. In an unprecedented three-day conference involving policy-makers, industry leaders, practitioners and scholars from many nations, Northwestern University's Transportation Center in June of 1987, provided the forum for crystallization of these arguments, and provided substantial support for the position that Deregulation had, indeed, had an adverse impact on airline safety, but that there were no existing reporting structures in place to formally document the depth and speed of the decline. It was further alleged by numerous speakers and papers at that conference that the death and accident statistics repeatedly cited by the Department of Transportation under the Reagan Administration as proof of no decline in the

safety of air transportation were a wholly invalid measure of the same.[5] The book resulting from that conference, *Transportation Safety in an Age of Deregulation* by Professors Moses and Savage of Northwestern (Oxford University Press, London; 1989), contains pivotal papers by the key conference speakers, including one by this author.[6]

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[5] From the Proceedings of the Transportation Deregulation and Safety Conference, June 23-25, 1987; Northwestern University Transportation Center. Indeed, in 1989, the Federal Aviation Administration let a contract to the Flight Safety Foundation to look for beneficial and effective ways to measure the so-called "Safety Buffer", also known as the "Safety Margins" of airline flying. This came at the end of an eight year administrative attitude under President Reagan that there was no such thing as a "Safety Buffer" or "Safety Margins", and that the system was either safe or unsafe at any given point as measured solely by death and accident statistics. (Flight Safety Foundation interviews).

[6] At page 203, I wrote the following, which was subjected to peer review: "We must create a new method of gauging the level of airline safety by taking a realistic, real-time measure of the safety margins. Accident and the death statistics are worthless as a gauge of such considerations, since only the complete absence of a safety buffer will show up as a clear trend in the number of passengers killed and the number of aircraft destroyed. Instead, we must formulate specific indicators that will fluctuate immediately and obviously when any trend of increased cost-cutting pressure begins to affect safety margins among the nation's air carriers."

"At the recent Northwestern University Transportation Deregulation and Safety Conference, NTSB Board Member John K. Lauber (1988) made the point this way:

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There are, however, some significant aspects of Deregulation's effects which are not the subject of general debate in the industry, though there effect in turn may be. Specifically, the strain on the supply of seasoned pilots (pilots who have considerable turbine experience) whether from defunct smaller carriers, defunct larger carriers, military, or corporate sources. In the face of a voracious increase in airline industry demand for such pilots, there was a precipitous decline in the number of those seeking major airline employment as early as 1980, as had been predicted during the deregulatory hearings of 1976-78. This trend, by 1981, had led inevitably to a significant decline in the level of overall experience in the cockpits of newly-formed airlines among the larger airline pilot forces.[7] The debatable point (according to those who continue to insist that Deregulation has had no adverse effect on safety) revolves around whether the incorporation of such less-experienced airmen has in

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"An accident is clear evidence that safety is lacking, but, by itself, the absence of an accident does not demonstrate that safety has been achieved. What is needed is a set of "leading safety indicators," along the lines of the "Leading economic indicators," and those should be used to examine further the effects of airline deregulation."

[7] The monitoring of the Future Airline Professionals Association of Atlanta, Georgia, through the period 1979-1991, forms a continuous and invaluable source of proof of this statement, as does various publications and reports of the National Transportation Safety Board, the Federal Aviation Administration, the Airline Transport Association, and many others.

itself been a factor lowering the levels of airline safety by lowering the safety margins which greater experience may be assumed to provide.[8] While acknowledging the inapplicability of accident statistics and experience as stand-alone indices of the levels of safety, recent accident experience as monitored, investigated, and reported by the National Transportation Safety Board does in fact show clearly that there are real-world empirical examples in the post-deregulatory United States of pilot inexperience having had disastrous contributory impact to major airline accidents. As illustrated by the Table on Attachment 1 of this Affidavit, there have been four major airline accidents during the deregulatory decade (1979-1989) directly attributable to the lack of crew experience. And as the table on Attachment 2 shows, there have been corresponding "saves" documented during the same period which demonstrate clearly the inestimable value of seasoning and experience in flight operations when things go wrong.[9] It is now a generally accepted

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[8] Authors Moses and Savage in the compilation work *Transportation Safety in an Age of Deregulation*, (Oxford University Press, 1989; London), quote Dr. John Lauber of the NTSB on Page 211: "Lauber considers the effect [increased pilot demand and decreasing experience levels] may have had on accident rates." "Effectively, Lauber argues that the probability of a pilot's being involved in an accident on any given flight is negatively related to the pilot's total hours of experience. The median experience level of the pilots involved in accidents has fallen from 16,500 to 13,000 hours. Since the number of less experienced pilots has been increasing, the weighted probability of an accident from this source has risen."

[9] This author, in fact, teaches human performance flight training courses internationally, and uses United 811 and

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principle in aviation safety that as levels of pilot experience decline, the safety margins decline, and thus the possibility of major accidents, rise.[10] Conversely, the presence of highly-experienced pilots, including some recycled airmen who were reincorporated in the airline system after losing their first airline jobs to deregulation-related business failures or declines (such as that of Braniff International in 1982), has spawned several provable and spectacular "saves."[11] As Jerome F. Lederer, President Emeritus, and John H. Enders, President and CEO of the highly respected Flight Safety Foundation said in their presentation to the Northwest Transportation Deregulation and Safety Conference in 1987:

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United 232 extensively as prime teaching examples of crew coordination and experience. The Aloha and both United accidents have been extensively and personally researched by the author.

[10] See Footnote 8. In addition, former NTSB investigator and respected Aviation Safety Consultant Gerard M. Bruggink stated recently in an article for Air Line Pilot Magazine (March, 1991):

"Whether the NTSB intended it or not, [their Air Florida explanation] for the crew's low experience established a link between the competitive pressure designed into deregulation and the degrading of existing and proven industry norms. Furthermore, by factoring the crew's limited experience into its causal statement, NTSB in 1982 indirectly recognized a new accident-enabling agent: the deregulation factor."

[11] In fact, the key pilots of both the Republic and the U.S.Air "saves" cited in Attachment 2 were former Air New England captains as was Captain McDonald. Please see NOTE on ATTACHMENT 2.

> "It is, of course, desirable to install pilots of well-defined experience and good judgment in the cockpits for safety reasons."

And as Dr. John K. Lauber, one of five Members of the NTSB and one of the founding fathers of modern Human Factor/Human Performance research, said in a March 28, 1989 address to the Aero Club of Washington, D.C.:

"[Pilot experience] is a fundamental human-performance issue – no amount of training can entirely compensate for inexperience."

It is, in fact, a thoroughly established concern in the airline industry of 1991 that the existing training courses for pilots may not adequately meet the increasing demands of less experienced new-hire airmen for training to proficiency. The decreasing availability of the flight engineer's position (with the advent of more and more two-pilot aircraft) for seasoning experience, and the greater speed of upgrade between First Officer and Captain, coupled with the lessening levels of entry experience, make a volatile mix that at the very least changes the equation and causes increased demands for training to substitute for experience.[12] With these truths, it is

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[12] Independent companies such as Simulator Training Incorporated of Seattle, Washington, have begun devising and marketing alternative training programs for international airlines which address just this issue. While experience cannot, as such, be imparted by formal classroom courses, a newly-trained ab initio pilot can gain significant air carrier experience before ever being exposed to passengers by serving as a first officer in a small Part 135 cargo operation which is otherwise

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axiomatic that reincorporation in the pilot force of the airline industry of highly-experienced pilots whose only offense has been to fly for a carrier which became economically non-viable and was shut down (or drastically reduced in size and scope) is, as the Congress determined it was in 1978, a matter of national interest and public policy. Yet to date there has been only one significant example of jobless experienced airmen with turbine experience being hired by existing carriers under the First Right of Hire provision, and that was the example of Piedmont Airline in hiring over 300 jobless protected pilots from various impacted airlines in 1982-84, a step that proved imminently successful.[13]

Logically, if greater levels of experience serve the cause of safety, lesser levels of experience strain the margins of safety, and therefore any system which tolerates

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engaged in transportation for hire with a single-pilot requirement. The marrying of a self-supporting source of line experience and an ab initio training course advanced curriculum is a measure of the near-desperation of commercial aviation to address the continuing decline in supply of experienced airmen at a time when the opportunities for low-threat on-the-job training (such as the flight engineer's position in older airliners) are declining with the purchase of new equipment and the expansion of services worldwide.

[13] In a personal conversation with this author in New York in 1987 at NBC headquarters, the former CEO of Piedmont during 1982-1983, Mr. William Howard, affirmed that the move had been very beneficial to their operations, and that the recycled airmen had brought a maturity and wealth of operational experience that had made Piedmont's massive expansion far more safe than would otherwise have been possible.

the discarding or ignoring of experienced professionals (such as one which refuses to faithfully utilize and enforce a First-Right-of-Hire method of reincorporation) does, de facto, compress and reduce to whatever extent the national levels of airline safety. Yet to this day the airline industry almost universally refuses to obey the laws of the nation regarding First Right of Hire, and the provision has been and remains, virtually toothless and useless, with the sole exception of the incident McDonald case. If, however, Captain McDonald is forced to accept a reduced settlement of such little monetary significance that it cannot even cover his legal fees, let alone compensate for the permanent damage done to his career, the court will have completed the job of thwarting the intent of Congress and the letter of the law by sending a clear and distinct massage to every airline in U.S. jurisdiction that cynical defiance of federal law is cheaper than obeying that law. No sane pilot would initiate a five-to-ten year period of litigation with the knowledge that in the end, after hundreds of thousands of dollars and hours expended, the airline that refused to honor his First Right of Hire rights would be forced to pay only a pittance amounting to a slap on the wrist. More to the point, rare would be the attorney who would take such a case. What the court in this case is deciding is no less than a major safety issue. The demand for experienced pilots has never been higher, yet the supply has never been lower, even if the "Protected Pilots" of Braniff and Continental and other defunct carriers are included. Unfortunately, many of those pilots cannot find employment again even in such a pilot shortage because they are perceived by the airlines to be too expensive in terms of projected service

years versus benefits and training. Even in a time of greatly reduced qualifications among pilot applicants, the Protected Pilots from such defunct carriers are systematically rejected in too many instances, and forced to compete unfairly with non-protected pilots in others. If the First Right of Hire provision, which after all was a matter of Federal Law, is emasculated by permitting this incorrectly-computed award reduction to stand, literally thousands of human-years of pilot experience will be lost, perhaps forever, to the flying public because the ability of an individual pilot to enforce these rights will, in effect, evaporate. This is far more than an esoteric tragedy. As the very real accidents on Attachments 1 and 2 clearly illustrate, on this decision may well rest the lives of innocent passengers the Congress was trying to reassure in 1978 when it passed the law the industry has so arrogantly ignored for so long.

Dated: Tacoma, Washington
13 MAY 1991

Respectfully submitted by,

/s/ John J. Nance
JOHN J. NANCE, ESQ.

Sworn to before me this
13th day of May, 1991,

/s/ Monica J Stevens
Notary Public, State of Washington.

ATTACHMENT 1

Human Performance Accidents Investigated by the NTSB in which pilot inexperience was specifically cited as a significant contributory cause:

| Date/ Location | Flight | Deaths/ Injuries | Type Aircraft |
|---|---|---|---|
| 13 JAN 82 Washington, DC | Air Florida Palm 90 | 74 dead 5 Injrd | Boeing 737 Destroyed |
| 6 SEP 85 Milwaukee, WI | Midwest Express Flight 105 | 31 dead | DC-9 Destroyed |
| 15 NOV 87 Denver, CO | Continental Flight 1713 | 28 dead 54 Injrd | DC-9 Destroyed |
| 20 SEP 88 New York, NY | U.S.Air Flight 5050 | 2 dead | Boeing 737 Destroyed |

Causal discussion:

Air Florida – Crew inexperience on a deregulatory airline in dealing with cold weather situations, and copilot inexperience in dealing with an unresponsive captain were key elements cited.

Midwest Express – Crew inexperience was a factor in flight crew being unable to properly handle an engine loss on takeoff, which is a routine emergency to experienced turbine-qualified pilots.

Continental – Extreme crew inexperience exacerbated by pairing two inexperienced pilots during difficult weather conditions led to a fatal mishandling of

a routine takeoff when first officer over-rotated and lost control.

U.S. Air – Accident crew with new-hire first officer and inexperienced captain mishandled a minor emergency on takeoff and attempted an improbable aborted takeoff.

ATTACHMENT 2

Accidents in which the experience and seasoning of the aircrew was directly linked to saving the aircraft and reducing deaths and injuries:

| Date/ Location | Flight | Deaths/ Injuries | Type Aircraft |
|---|---|---|---|
| 12 May 81 Augusta, Maine | Air New England Flight 686 | No Deaths | DHC-6 Twin Otter Recovered |
| 6 NOV 83 * Sioux Falls, SD | Republic Flight 972 | 1 Injured Captain Hurt | CV-580 Convair Recovered |
| 17 MAY 86 * Chicago, IL | U.S. Air Flight 373 | No Deaths | DC-9 Recovered |
| 28 APR 88 Hawaii | Aloha Flight 243 | 1 dead 18 injrd | Boeing 737 Recovered |
| 24 FEB 89 Hawaii | United Flight 811 | 9 dead Several Injured | Boeing 747-200 Recovered |
| 19 JUL 89 Sioux City, IW | United Flight 232 | 111 dead 44 Injrd | DC-10 Destroyed |

* (See NOTE next page)

Overview:

Air New England – After a catastrophic flight control failure, an experienced captain managed to safely land the aircraft against significant odds with extreme vibration and a nearly uncontrollable elevator.

Republic – A goose penetrated the Captain's windscreen, blinding him, rendering him unconscious, and causing various electrical and system failures. An experienced first officer hung on to the crippled aircraft and made a safe landing with no additional injuries.

U.S. Air – Aircraft was erroneously cleared for takeoff at the same [time] a second jet was cleared to takeoff on an intersecting runway. The highly experienced first officer saw an imminent collision first, seized the aircraft, and by instant manipulation of throttles and yoke managed to clear the other jet by a small margin.

Note:

In the cited Republic and U.S. Air accidents, both of the key pilots credited with the save of the aircraft in each respective case were former Air New England captains, as was Captain McDonald. After the collapse of Air New England, Captain Roger Charbonneau was hired by Republic Airlines (during a brief three month period in which they were honoring First Right of Hire), while

Captain Jim McDevitt was hired by U.S.Air. The key difference between McDevitt on one hand and Paul McDonald on the other, was that while McDevitt was under the "age cutoff" for hiring at U.S.Air, McDonald was too old, and would have been considered too old at most airlines under the age cutoffs then existing. It is important to understand that until the mid to late 1980's, the vast majority of major and national airlines in the United States openly discriminated in pilot hiring on the basis of age, flatly refusing to even consider an otherwise qualified applicant solely because he or she was in excess of 30, 32, or 35 years of age (different carriers used different cutoffs in this range). While lower pilot applicant availability and increased equal opportunity pressure has all but eliminated such discrimination in 1991, it was in full use in 1982-1983 as an industry standard. It was in recognition of this fact of airline life that the Congress included the words: "regardless of age" in the First Right of Hire provisions.

After their respective "saves", McDevitt was presented with the coveted Dadaleus Medal and the ALPA Superior Airmanship medal, both significant national awards. Charbonneau also received the ALPA Superior Airmanship medal. These awards were formal recognition of the type of invaluable experience which Piedmont, essentially, threw away in refusing to hire Paul McDonald.

Aloha – After a catastrophic failure and separation of over 60% of the forward cabin structure and the loss of one flight attendant, two experienced pilots gingerly effected an emergency descent with far more gentle handling than normally called for in the operations manual, and safely recovered the aircraft. Structural integrity was so compromised that had the traditional and

widely-taught emergency descent procedure been followed blindly, the aircraft would have most likely broken up in flight with no survivors.

United 811 – This is, perhaps, the most important accident in recent aviation history in illustrating the value of smooth crew coordination in the cockpit during an emergency. Highly experienced captain accompanied by an equally-experienced training captain in the right seat and a well-seasoned flight engineer managed a one-shot return to Honolulu as their crippled 747 with a large section of the right fuselage missing sank toward the water, unable to sustain flight at that weight with only two engines. Extensive system and procedural knowledge and cooperation averted a ditching with potential catastrophic loss of life.

United 232 – Following the complete and total loss of flight controls (hydraulic failure on 3 systems), the perseverance and smooth coordination of effort under the command of a near-retirement captain, coupled with the help of a check-airman from the airline's training department, permitted a partial recovery of an otherwise sure-fatal situation.

JOHN J. NANCE

*CURRICULUM VITAE*

Lodged herein, appended to Nance Affidavit, which is appended to McDonald's Petition to Rehear.

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(2)

No. 91-607

Supreme Court, U.S.
FILED
OCT 23 1991
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In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

PAUL F. MCDONALD,

*Petitioner,*

v.

PIEDMONT AVIATION, INC.

*Respondent.*

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

# OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did a unanimous panel of the United States Court of Appeals for the Second Circuit properly reverse a jury's unprecedented award of lifetime wages and employee benefits totalling 42 years under Section 43(d) of the Airline Deregulation Act of 1978 and limit such damages to 72 months of back pay where the plain language, structure and purpose of the statute establish that Congress created a temporary, transitional assistance program?

TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE WRIT ..... 4

I. The Second Circuit's Decision Is Consistent With The Language, Structure And Purpose Of The Employee Protection Program And Does Not Raise An Issue Of National Importance ..... 6

II. The Second Circuit's Decision Is Consistent With This Court's Decision In *Alaska Airlines* Which Recognized That The Financial Assistance Provisions And The First-Hire Preference Were Related ..... 12

III. There Is No Conflict With The United States Court Of Appeals For The District Of Columbia Circuit Or The Department of Labor ..... 14

IV. Resolution Of The Question Presented By Petitioner Is Not Necessary Since Additional Grounds Support The Second Circuit's Reversal On Damages ..... 17

CONCLUSION ..... 20

## TABLE OF AUTHORITIES


Page

**Cases:**

*Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) ..... passim

*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) ..... 11

*Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972) ..... 10

*Anastasio v. Schering Corp.*, 838 F.2d 701 (3d Cir. 1988) ..... 18

*Crocker v. Piedmont Aviation, Inc.*, 741 F. Supp. 241 (D.D.C. 1989) ..... 15

*Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991) ..... passim

*Crocker v. Piedmont Aviation, Inc.*, No. 86-1673 (RCL), 1990 U.S. Dist. LEXIS 1324 (D.D.C. Feb. 8, 1990) ..... 16

*Dominic v. Consolidated Edison Co.*, 822 F.2d 1249 (2d Cir. 1987) ..... 18

*Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312 (9th Cir. 1991) ..... 5

**Cases (continued):**

*Hulsey v. USAir, Inc.*, 868 F.2d 1423 (5th Cir.), *cert. denied*, 493 U.S. 892 (1989) ..... 12

*Long v. Trans World Airlines, Inc.*, 913 F.2d 1262 (7th Cir. 1990) ..... 5

*McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir. 1991) ..... 2, 3, 16

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) ..... 6, 17

*Montana-Dakota Util. Co. v. Northwestern Publ. Serv. Co.*, 341 U.S. 246 (1951) ..... 7

*New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) ..... 11

*United States v. Price*, 361 U.S. 304 (1960) ..... 7

*United-Capital Merger Case*, 33 C.A.B. 307 (1961) .. 10

*Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984) ..... 18

**Statutes:**

Airline Deregulation Act of 1978

49 U.S.C.A. § 1552 *et seq.* (West Supp. 1991) ..... passim

**Statutes (continued):**

Interstate Commerce Act, 49 U.S.C.A. § 11347 (West Supp. 1991) . . . . . 11

Age Discrimination in Employment Act of 1978, 29 U.S.C.A. § 621 *et seq.* . . . . . 11

Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.* . . . . . 11

**Legislative Material:**

S. Rep. No. 631, 95th Cong., 2d Sess. 115 (1978) . . . . . passim

Sup. Ct. R. 10 . . . . . 4

No. 91-607

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October Term, 1991

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*Petitioner,*

v.

PIEDMONT AVIATION, INC.

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Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

# OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Piedmont Aviation, Inc. ("Piedmont")[1] respectfully submits this brief in support of its request that the Court deny the petition for a writ of certiorari to

[1] Pursuant to Supreme Court Rule 29.1, Respondent certifies that as of August 5, 1989, Piedmont Aviation, Inc. was merged into USAir, Inc., a wholly owned subsidiary of USAir Group, Inc.

review the unanimous judgment of the United States Court of Appeals for the Second Circuit in *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir. 1991).

## STATEMENT OF THE CASE

McDonald commenced this action against Piedmont in the United States District Court for the Southern District of New York in late 1984, alleging that he had been denied a "first right of hire" as a "protected employee" under Section 43(d) of the Employee Protection Program (the "EPP") of the Airline Deregulation Act of 1978 (the "ADA"), 49 U.S.C.A. § 1552 *et seq.* (West Supp. 1991). McDonald claimed that when he applied to Piedmont for employment as a pilot in November 1981, Piedmont, a "covered carrier" subject to the EPP's first-hire duty, failed to hire him for positions that were filled by non-protected applicants. The complaint sought a judgment directing Piedmont to hire McDonald as a pilot and granting him seniority as of November 1, 1981, as well as back pay and other damages.

A jury found Piedmont liable for failing to hire McDonald and awarded him $2,226,920.00 in wages and employee benefits for a 42-year period, including back pay for more than 8 years, front pay for 15 years and pension benefits for an additional 19 years. This award of lifetime wages and benefits for a 42-year period was unprecedented under federal employment law.

Piedmont appealed from the judgment entered after the jury's verdict. The Court of Appeals for the Second Circuit affirmed the jury's determination of liability but reversed the award of damages. *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir. 1991). Specifically, the unanimous panel held that the district court erred in permitting the jury to award compensatory damages for the projected duration of McDonald's career. The Court of Appeals found, consistent with the EPP's statutory language and its purpose as a temporary transitional assistance program, that damages under Section 43(d) are limited to a maximum of 72 months.

## REASONS FOR DENYING THE WRIT

Petitioner has cited no "special and important reasons" warranting a grant of a writ of certiorari in this case. Sup. Ct. R. 10.1. The EPP was enacted as part of the ADA to provide temporary transitional assistance to workers in the airline industry displaced by deregulation during a 10-year period ending in 1988. Section 43(d) gives "protected employees" a hiring preference with "covered carriers." Several lower courts have held that Section 43(d) creates an implied right of action. The Second Circuit agreed and fashioned a remedy consistent with the statutory scheme of providing temporary transitional assistance by limiting damages to 72 months.

Contrary to Petitioner's assertions, the decision below is consistent with this Court's decision in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), which held only that the EPP was severable from and therefore survived an unconstitutional legislative veto provision. Moreover, there is no conflict between the Second Circuit's decision below and the decision of the Court of Appeals for the D.C. Circuit in *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991), which did not address the issue of the amount or duration of damages at all, but held only that a protected employee

did not lose his hiring preference by taking a job with a non-covered airline. Finally, resolution of the question presented by Petitioner will not dispose of this case. Piedmont raised several additional meritorious arguments that would have resulted in reversal of the district court's judgment had the court below found it necessary to reach them.

This case raises no issues of national importance justifying review by this Court. Eligibility under the EPP's temporary assistance provisions expired three years ago, and there have been few cases arising under this statute.[2] Accordingly, there is no compelling reason to review the Second Circuit's decision.

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[2] Petitioner's bald assertion that he is one of "thousands of protected employees whose Section 43 rights were flagrantly dishonored" finds no support in the record. Petition at 5. In fact, counsel for Piedmont is aware of only a few pending cases arising under Section 43(d) of the EPP. *See Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312 (9th Cir. 1991); *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991); *Long v. Trans World Airlines, Inc.*, 913 F.2d 1262 (7th Cir. 1990). Each of these cases addressed issues entirely different from the issue decided by the Second Circuit.

## I. The Second Circuit's Decision Is Consistent With The Language, Structure And Purpose Of The Employee Protection Program And Does Not Raise An Issue Of National Importance

The decision below was correctly decided, is consistent with congressional intent expressed in the language and structure of the EPP as well as its legislative history, and, because it relates to a temporary transitional program that has now expired, does not raise any issue of national importance upon which the Court's guidance is needed.

Because Congress failed to provide a mechanism for enforcing the EPP, several lower federal courts have implied a right of action under Section 43(d). In determining what relief may be available under the implied private right of action, the court's "'function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982) *(quoting Montana-*

*Dakota Util. Co. v. Northwestern Publ. Serv. Co.*, 341 U.S. 246, 261-62 (1951) (Frankfurter, J., dissenting)).[3]

The Second Circuit properly construed the statutory language and structure of Section 43 and concluded that the temporary and transitional nature of the EPP required that damages under an implied right of action be limited to 72 months.

Section 43 consists of two interrelated components. *Alaska Airlines*, 480 U.S. at 694 n.18. The first provides for monthly federal assistance payments while a displaced airline employee is looking for employment. Although the first component has never been implemented,[4] the terms

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[3] None of the recent Supreme Court cases cited by Petitioner in support of his argument that the Second Circuit incorrectly construed the EPP dealt with the fashioning of a remedy for an *implied* right of action. *See* Petition at 11-13. In each of these cases, the Supreme Court was construing express provisions of a statute. Here, because Congress failed to provide any remedy under the EPP, the Second Circuit properly looked at the plain language, structure and purpose of the statute as a temporary transitional assistance program.

[4] The Secretary of Labor never adopted rules to implement the financial assistance program, and Congress has not appropriated funds for such payments. However, the ultimate failure of Congress to fund the monthly assistance program has no bearing upon the intent of Congress at the time the program was enacted. *See United States v. Price*, 361 U.S. 304, 310-12 (1960).

of this assistance program reflect "close to the full cost" of the protection that Congress intended to provide "protected employee[s]" who lost their jobs as a result of a "qualifying dislocation." *See* 49 U.S.C.A. § 1552(a), (h) (West Supp. 1991); *Alaska Airlines,* 480 U.S. at 693 *(quoting* S. Rep. No. 95-631, p. 114 (1978)). The monthly federal assistance payments were to be a percentage of the employee's last salary as determined by the Secretary of Labor (less any unemployment compensation received), 49 U.S.C.A. § 1552(b)(1) (West Supp. 1991), and were to continue until either the protected employee obtained "other employment" or the passage of 72 months, whichever occurred first. *Id.* § 1552(e)(1).

The hiring preference under Section 43(d) was a second, interrelated component. *Alaska Airlines,* 480 U.S. at 694 n.18. The hiring preference only applies to protected employees who were terminated (other than for cause) "prior to the last day of the 10-year period beginning on October 24, 1978." 49 U.S.C.A. § 1552(d) (West Supp. 1991). All of the obligations under Section 43 -- financial assistance *and* hiring preference -- "terminate on the last day the Secretary [of Labor] is required to make a payment under this section." 49 U.S.C.A. § 1552(j) (West Supp. 1991). Together these

two provisions manifest the temporary and transitional nature of the statute. Accordingly, the Second Circuit correctly concluded that damages should be limited to 72 months.

The legislative history of the ADA supports this conclusion. Congress recognized in 1978 that deregulation might cause some short-term loss of employment. To cushion the impact of deregulation on employees, Congress concluded that "a temporary transitional assistance program" was appropriate. S. Rep. No. 631, 95th Cong., 2d Sess. 115 (1978) (hereinafter cited as "Senate Report"). Section 43, with its financial assistance and hiring preference components, is that temporary, transitional program.

The cost of Section 43 was to be borne principally by the public. The Senate Report states that

> the public interest will be best served by a more competitive system in which airline management has greater discretion with respect to routes and prices. Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees.

Senate Report at 114. *See Alaska Airlines,* 480 U.S. at 692-93. The hiring preference in Section 43(d) would make new jobs available to protected employees, thereby "decreas[ing] the cash payments required under the [federal assistance] program." Senate Report at 116. Together the financial assistance provisions and hiring preference were "intended to place on the *employees* the reasonable requirement of seeking and accepting available employment while still providing assistance where necessary." *Id.* at 116 (emphasis added).

In structuring the "temporary transitional assistance" afforded to employees under Section 43, Congress relied heavily on other forms of labor protection imposed on the airline and railroad industries -- none of which extends protection to employees beyond 72 months. In airline merger cases, the Civil Aeronautics Board imposed labor protective conditions including up to 60 months of supplemental compensation for those airline employees who lost their jobs. *See Alaska Airlines,* 480 U.S. at 692 n.16 *(citing United-Capital Merger Case,* 33 C.A.B. 307, 342-47 (1961); *Allegheny-Mohawk Merger Case,* 59 C.A.B. 22, 31-40 (1972)). Similarly, Section 11347 of the Interstate Commerce Act contains employee protection for railroad employees to cushion any short-term loss of

jobs in connection with a railroad merger, consolidation or coordination -- typically 72 months of supplemental compensation based on a percentage of a railroad employee's most recent salary. *See New York Dock Ry. v. United States,* 609 F.2d 83, 87, 91 (2d Cir. 1979); 49 U.S.C.A. § 11347 (West Supp. 1991) *(amending* 49 U.S.C.A. § 5(2)(f)). Because the EPP has its origin in labor protective provisions imposed on the airline and railroad industries, the remedy available under Section 43 should not exceed the limited relief afforded to railroad and airline employees under similar circumstances.

The temporary, transitional nature of Section 43 is easily distinguished from federal statutes designed to eradicate the effects of discrimination in society, like Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.,* or the Age Discrimination in Employment Act of 1978, 29 U.S.C.A. § 621 *et seq.,* where Congress intended to provide "make whole" relief. *Cf. Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419-21 (1975) ("The 'make whole' purpose of Title VII is made evident by the legislative history."). Section 43 does not guarantee a protected employee a particular job or "career" at a covered carrier, nor does it guarantee higher compensation than he earned in his previous job. It certainly does not envision a

lifetime annuity to be awarded by a jury or the "comfortable career" that Petitioner seeks. Petition at 22.[5]

The district court's award of lifetime damages was inconsistent with Congress' intent to establish a "temporary transitional assistance program," Senate Report at 115, and resulted in a windfall recovery for *McDonald*. The Second Circuit properly recognized the district court's error and limited the damages award to the 72-month period for financial assistance specified by Congress.

## II. The Second Circuit's Decision Is Consistent With This Court's Decision In *Alaska Airlines* Which Recognized That The Financial Assistance Provisions And The First-Hire Preference Were Related

In *Alaska Airlines*, this Court held only that the unconstitutional legislative veto provision contained in the

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[5] The Fifth Circuit's decision in *Hulsey v. USAir, Inc.*, reaffirms that Section 43(d) created only a hiring preference, not an entitlement to a career. 868 F.2d 1423, 1425 (5th Cir.), *cert. denied*, 493 U.S. 892 (1989) (Section 43(d) was not violated when a protected employee given a hiring preference was terminated by the covered air carrier during his probationary period).

EPP was severable from the remainder of the EPP provisions. That case did not remotely involve the issue of damages recoverable by a protected employee in an implied private action under the EPP.

Petitioner's contention that the Second Circuit's interpretation of the EPP is in conflict with footnote 18 of *Alaska Airlines* is without merit. In footnote 18, this Court addressed arguments relating to the severability of the legislative veto provision. The petitioners in that case argued that since the legislative veto was crucial to the passage of the financial assistance provisions, it must also have been crucial to the first-hire provisions, the two being "tightly linked." Id. at 694 n.18. Although the Court rejected the argument in the context of the legislative veto, it confirmed that in other respects the first-hire provisions and financial assistance provisions are connected. "The two components *were related* in that the right of first-hire was predicted to 'decrease the cash payments required under the program,' S. Rep. No. 95-631, p. 116, and the Act conditions the receipt of monthly assistance payments on cooperation with the Secretary [of

Labor] in seeking other employment, § 43(d)(2)." 480 U.S. at 694 n.18 (emphasis added).[6]

Similarly, the Second Circuit recognized that the provisions of Section 43 were interrelated. In implying a private remedy under Section 43(d), the court was required to accomplish the legislative intent of providing temporary and transitional assistance and encouraging protected employees to seek work. Accordingly, the Second Circuit limited damages to 72 months, the maximum period of time expressly provided by Congress for financial assistance payments under Section 43.

## III. There Is No Conflict With The United States Court Of Appeals For The District Of Columbia Circuit Or The Department of Labor

Petitioner's attempt to invent a circuit conflict is equally unavailing. In *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991), the Court of Appeals for the D.C. Circuit was faced *solely* with the issue of *when* a

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[6] The Court noted that the legislative veto was not crucial to the first-hire provisions, even though related to the financial provisions, since "the first-hire program is capable of serving as the sole means of employee protection." *Id.*

protected employee's right of first-hire under Section 43(d) is extinguished. The issue presented in *Crocker* was very fact specific and bears no resemblance to the issue addressed by the Second Circuit. The question of damages for breach of Section 43(d) was not before the *Crocker* court and thus *Crocker* is inapplicable here.

In *Crocker,* the district court granted judgment for Piedmont on the ground that Crocker ceased to be a covered employee entitled to the first-hire preference when he accepted a "reasonably comparable position" with Coral Air, a non-covered carrier with no duty under Section 43(d). *Crocker v. Piedmont Aviation, Inc.,* 741 F. Supp. 241, 244 (D.D.C. 1989). The Court of Appeals reversed, finding that obtaining "reasonably comparable employment" should not extinguish the first-hire right. *Crocker,* 933 F.2d at 1026. Rather, a protected employee's first-hire preference is only extinguished through employment with a covered carrier. *Id.* at 1027.

Nothing in *Crocker* conflicts with the Second Circuit's decision here. Contrary to Petitioner's assertions, the Second Circuit did not "heavily rel[y]" on the district court's decision in *Crocker.* Rather, the Second Circuit cites the district court's decision for the irrefutable proposition, supported by this Court's decision in *Alaska*

*Airlines* and the ADA's legislative history, and not disputed by the District of Columbia Circuit, that "[t]he duty to hire provision was adopted as a supplement for the monthly assistance payments to reduce and [sic] burden on the federal government purse. . . ." *McDonald,* 930 F.2d at 227 *(quoting Crocker v. Piedmont Aviation, Inc.,* No. 86-1673 (RCL), 1990 U.S. Dist. LEXIS 1324 (D.D.C. Feb. 8, 1990)); *see Alaska Airlines,* 480 U.S. at 694 n.18; Senate Report at 116; *Crocker,* 933 F.2d at 1027.

The appellate court in *Crocker* recognized this purpose of the EPP and concluded that extinguishing the first-hire right upon acceptance of employment with a non-covered carrier would frustrate the legislative intent to encourage reemployment of displaced employees. The prospect of losing the first-hire right would discourage such employees from taking interim employment with a non-covered carrier. 933 F.2d at 1024.

The Second Circuit's application of a 72 month limitation on damages is thus wholly consistent with the legislative intent and the *Crocker* decision. By limiting damages, protected employees are encouraged to pursue employment opportunities in the airline industry. This is precisely what Congress intended when it created a temporary transitional program.

Petitioner further contends that the Second Circuit opinion is in conflict with the position of the Department of Labor ("DOL") set forth in its *amicus curiae* brief filed in *Crocker*. The DOL brief relates strictly to *when* the first-hire preference is extinguished. The DOL did not address in any respect the appropriate remedy under the statute. Furthermore, as the agency charged with promulgating regulations under Section 43, including regulations relating to whether an employee is entitled to a hiring preference, the DOL's position was properly considered by the *Crocker* court. Here, however, the question of relief available under an implied right of action is solely within the province of the courts. *See Merrill Lynch*, 456 U.S. at 376-77.

## IV. Resolution Of The Question Presented By Petitioner Is Not Necessary Since Additional Grounds Support The Second Circuit's Reversal On Damages

The Second Circuit did not reach several additional arguments raised by Piedmont supporting reversal of the district court's award of damages. The court below could have found that damages should have been limited on any of three additional grounds. First, the district court erred in permitting the *jury* to award front pay. Front pay is an

equitable remedy that is sometimes awarded by a trial judge, not a jury, in employment discrimination cases in lieu of reinstatement to effectuate the remedial purposes of a statute. *See Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (whether a front pay remedy is available under the ADEA and the amount of front pay to be awarded is to be answered by the court, not the jury). Therefore, if an award of front pay were appropriate under Section 43(d), which it is not, the judge and not the jury should have made that determination.

Second, the district court erred in failing to impose limitations on any front pay award. The Second Circuit, like other courts, has placed strict limitations on front pay awards. Finding such awards susceptible to undue speculation, courts limit future damages to periods lasting only a few months or, at most, a few years and require a sufficient evidentiary basis to support such limited awards. *See, e.g., Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984); *see also Anastasio v. Schering Corp.*, 838 F.2d 701, 709 (3d Cir. 1988).

Third, the district court erred in excluding relevant evidence demonstrating that McDonald had failed to mitigate his damages. Piedmont was not allowed to inquire whether Petitioner had informed other covered

carriers of his right to a hiring preference under Section 43(d) or to offer in evidence Petitioner's applications to other air carriers. Failure to allow this evidence prevented Piedmont from establishing that McDonald failed to make reasonable efforts to find available employment at other covered carriers.

## CONCLUSION

The decision of the Second Circuit to limit damages available under Section 43(d) to 72 months was correct, consistent with congressional intent expressed in the language, structure, and legislative history of the statute, and not inconsistent with any decision of this Court or any of the circuits. For all of the foregoing reasons, McDonald's petition for a writ of certiorari should be denied.

Dated: October 23, 1991 Respectfully submitted,

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